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Special Freight Services

Allowances and Privileges

PART III

Prepared under the direction of the *Advisory Traffic Council of The American Commerce Association*

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The American Commerce Association

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PREFACE

IN the movement of commodities over the various transportation systems of the country, there are many special services, allowances and privileges granted the shipper or consignee by the carrier, which have an important effect upon the rate or the shipment and exert a strong influence upon successful distribution and marketing.

Without a proper understanding of these factors, it is impossible to take full advantage of the transportation facilities offered or to market goods successfully in competition with those who possess a knowledge of their advantages and are able to utilize them in an effective manner. For this reason such knowledge becomes a necessary part of the equipment of all traffic managers, for by its employment markets are reached which would otherwise prove inaccessible or unprofitable.

Prior to the establishment of the Interstate Commerce Law, there was a lack of uniformity in the application of these services, allowances and privileges, resulting in the granting of undue preference to certain shippers and localities.

Since the passage of the act, however, all such matters have come under the regulative authority of the Interstate Commerce Commission, have been legalized and made uniform, and have become a regular and highly essential part of the transportation service. A knowledge of their

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application is a vital requirement of successful commercial and industrial development.

The purpose of this volume and the two other volumes on "Special Freight Services" is to present and discuss these Services, Allowances and Privileges in such a manner as to show their definite application to freight movements, in conformity with tariff and regulative requirements.

Part 3 of "Special Freight Services," which constitutes the present volume, deals with Transit Privileges and Rules, with Refrigeration, Ventilation and Pre-cooling Facilities, with Embargoes, with Tap Lines and Industrial Railroads, and with the Allowances Permitted by Law on Account of Special Services Rendered or Facilities Furnished by Shippers.

These three volumes constitute a complete record and discussion of all the Special Freight Services, Allowances and Privileges which are now permitted under regulative authority. An accurate and comprehensive understanding of these matters is today as necessary to the traffic official as a knowledge of correct rating, routing and packing.

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CHAPTER I.

TRANSIT PRIVILEGES AND RULES.

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CHAPTER I.

TRANSIT PRIVILEGES AND RULES.

§ 1. Nature of Transit Privilege.

Transit is technically defined as the "passing through or over" and implies that a commodity is first carried to a milling or manufacturing point where a commercial process is performed and the resulting product is moved on to other destinations. This definition is sufficiently comprehensive of milling, manufacturing, and grading in transit, but does not meet all of the numerous ramifications to which the transit privilege has been extended. Transit is inclusive of any permitted relation of contact with the shipment that the shipper may exercise during the transit period and before the full completion of the transportation service.

The first transit privilege in the United States was granted in 1870 by permitting the rebilling and reshipping of grain at Nashville, Tenn., and since that time the practice has become a part of the transportation service of carriers generally throughout the country.

Transit in many cases is beneficial in its application. When it can be applied without discrimination, it results in the better diffusion of business, in giving to rival communities the relative advantages to which they are entitled, and which can be accorded them in no other way, and, generally speaking, in the application of lower transportation charges. The commercial operations of this country

have, in many instances, developed through the enjoyment of transit privileges and the Interstate Commerce Commission has never held that transit was to be condemned in so far as it was beneficial and could properly be applied.

These privileges had grown up, and the Commission found them in full vigor when the Act to Regulate Commerce became a law. In the earlier cases it hesitated, in the absence of power to regulate transit, to lend its approval to the practice. In fact, many carriers and shippers insisted that the practice be abolished altogether and that flat rates be substituted in lieu thereof. However, today transit has become a practice of such universal prevalence upon all the railroads that it has become as much the duty of the Commission, under the law, to supervise and regulate these rules and practices as the rates, rules and practices generally of interstate carriers.

As applied to certain commodities, transit has been beneficial, and its abrogation would probably result in an unjustifiable destruction of property values. Grain is milled in transit, cotton is compressed, wool is sorted and graded, lumber is dressed, live stock is fed and grazed and also stopped to test the market, and structural steel is fabricated in transit. Other illustrations could be cited. The majority of commodities, subject to transportation however, do not enjoy transit. At best transit involves rate difficulties peculiarly its own. Shall these difficulties and the confusion which frequently results therefrom obscure the publication of rates and deprive tariffs of one of their most essential qualities, namely, clearness? The Commission holds that considerations of this nature should be most thoroughly analyzed and weighed before transit is extended into new fields. To deal with transit as an established service in a limited field is one thing; to follow

a policy of its indefinite extension is quite another, said the Commission.

It is manifest that, ordinarily, transit can only be accorded products which move at the same or very nearly the same rates as the material from which they were made. It is reasonable to withhold transit from a product that is essentially different from the raw material.

Transit privileges are susceptible of defense only upon the theory that the inbound and outbound movements are parts of a single continuous transaction of transportation. In other words, the fundamental basis and chief justification of transit is the equalization of rates and the prevention of discriminations which could not otherwise be avoided.

While the transit privilege for a long time was deemed to be optional with the carrier and the jurisdiction of the Commission thereof doubtful, the amendment of the Act of 1906 made it clear that the privilege, in its various forms, was a regulation or practice affecting the rate and of which the Commission had jurisdiction.

In some of its decisions prior to 1906, the Commission held that the transit privilege was one which the carrier might or might not accord the shipper, at its option, provided no discrimination was effected. The same view was expressed in several opinions of the Commission made subsequent to the 1906 amendment, and while the Commission has frequently followed the cases which were decided prior to 1906, in no case has it declined to establish a transit arrangement where the facts showed that its establishment was required to remove a discrimination or unjust situation. The contention so frequently brought forward in the past, that the Commission had no power to require carriers to initiate the practices of proper transit privileges, rested upon the theory that these practices exist

only where the carriers hold themselves out to perform the service on the basis of the specific through rate, but the language of the Act, when read in the light of the law and the decisions of the courts, has no such restricted meaning, nor could the tariffs effect any such limitation upon the right or the service.

The Commission recognizes that, in most instances, transit privileges are a commercial necessity because of their almost universal application, and on account of the development which certain lines of business have taken under them entailing heavy investments.

The allowance of a transit privilege in the nature of milling grain in transit and forwarding the milled product under the through rate in force on the grain, from the point of origin to the ultimate destination, is optional with the carrier, who may, if he see fit to grant such special privilege, prescribe the terms and conditions upon which it may be availed of by the shipper.

The allowance, however, of a transit privilege by a carrier to shippers in one section must be without wrongful prejudice to the rights of shippers in another section served by its line.

Nor may the shipper demand of the carrier a privilege of milling, manufacturing or merchandising his shipments in transit, to be treated constructively in course of transportation, while in the hands of the owners or millers. The stopping of a commodity in transit for the purpose of treatment or reconsignment is in the nature of a special privilege which the carrier may concede, but which the shipper cannot, in the present state of the law, demand as a lawful right.

Doran & Co. vs. N. C. & St. L. Ry. Co., 33 I. C. C. Rep. 523, 526.

Duncan & Co. vs. N. C. & St. L. Ry. Co., 35 I. C. C. Rep. 477, 480.
Fabrication in Transit Charges, 29 I. C. C. Rep. 70, 76, 78, 82.
Spiegle vs. Sou. Ry. Co., 25 I. C. C. Rep. 71, 73.
The Transit Case, 24 I. C. C. Rep. 340, 348.
In re Transportation of Wool Hides and Pelts, 23 I. C. C. Rep. 151, 171.
Douglas & Co. vs. C. R. I. & P. Ry. Co., 21 I. C. C. Rep. 97, 102.
In re Reduced Rates on Returned Shipments, 91 I. C. C. Rep. 409, 417.
St. Louis Hay & Grain Co. vs. M. & O. R. R. Co., 11 I. C. C. Rep. 90.
Koch et al. vs. P. R. R. Co. et al., 10 I. C. C. R. 675.
Diamond Mills vs. B. & M. R. R. Co., 9 I. C. C. R. 311.

Compare—

Middletown Car Co. vs. P. R. R. Co., 32 I. C. C. Rep. 185, 186.
Empire Coke Co. vs. B. & S. R. R. Co., 31 I. C. C. Rep. 573, 577.
In re C. & N. W. Ry. Reconsignment Rules, 29 I. C. C. Rep. 620.
Becker vs. P. M. R. R. Co., 28 I. C. C. Rep. 645.
Central Commercial Co. vs. L. & N. R. R. Co., 27 I. C. C. Rep. 114.
In re Substitution of Tonnage, 18 I. C. C. Rep. 280.
Douglas & Co. vs. C. R. I. & P. Ry. Co., 16 I. C. C. Rep. 232.
Morgan vs. M. K. & T. Ry. Co., 12 I. C. C. Rep. 525.
T. & N. O. R. R. Co. vs. Sabine Tram Co., 227 U. S. 111.

§ 2. Transit Privileges May Not Be Given Retroactive Effect.

The Commission has consistently held in the past that it could not, with propriety, make a transit privilege retroactive in practical effect by an order of reparation on shipments made at a time when the same was not available, the basis of such reparation being the nonavailability of such privilege at the time shipments moved and the subsequent publication of the same.

Sunnyside Coal Mining Co. vs. D. & R. G. R. R. Co. et al., 16 I. C. C. R. 558.

This holding is in accordance with the earlier conference ruling.

I. C. C. Conference Rulings Bull. No. 6, Rulings Nos. 77, 166.

§ 3. Terminal Charges and Allowances Must Be Legally Published and Filed with Interstate Commerce Commission.

Each carrier shall publish, with proper I. C. C. numbers, post and file separate tariffs which shall contain in clear, plain and specific form and terms all the terminal charges and all allowances, such as arbitraries, switching, icing, storage, elevation, diversion, reconsignment, transit privileges and car service, together with all other privileges, charges and rules which in any way increase or decrease the amount to be paid on any shipment as stated in the tariff which contains the rate applicable to such shipment, or which increase or decrease the value of the service to the shipper. Such tariffs must stipulate clearly the extent of such privileges and the charges connected therewith, and shall also state whether or not the rate published by the initial carrier from the point of origin to ultimate destination will apply. If the through rate does apply it must be as of the date of shipment from point of origin.

If such privilege is granted or charge is made in connection with the rate under which the shipment moves from point of origin, the initial carrier's tariff which contains such rate must also show the privilege or the charge, or must state that shipments thereunder are entitled to such privileges and subject to such charges according to the tariffs of the carriers granting the privileges or performing

the services, as are lawfully on file with the Interstate Commerce Commission.

I. C. C. Tariff Circular 18-A, Rule No. 10. (See also Rule No. 74-(a) and (b).

§ 4. Legality of Transit Privilege.

The Commission has held that it is not unlawful for a carrier, as a part of the contract for through shipment, to allow its stoppage in transit for treatment, such as grading, sorting, cleaning, milling, concentration, etc., and its subsequent forwarding to ultimate destination on a proportional or balance of through rate from the initial origin point.

Re Rates and Practices of M. & O. R. R. Co., 9 I. C. C. R. 373.
See also Re Alleged Unlawful Rates in the Transportation of Cotton, etc., 8 I. C. C. R. 121.
Cent. Yellow Pine Assn. vs. V. S. & P. R. R. Co. et al., 10 I. C. C. Rep. 193.
Cowan vs. Bond, 39 Fed. Rep. 54, from 2 I. C. R. 542.
See Conf. Rulings Bull. No. 6, Ruling No. 77, p. 20.

Recognition of transit privilege of a legitimate nature, such as "transfer in transit," "elevation," etc., is now included in first section of the Act, and "it is clear that the law recognizes elevation as a facility which a carrier may provide for the benefit of its shippers if it finds it to its interest to do so as an inducement for shippers to send their traffic over its line.

Act to Reg. Com. (Amd. 1910) sec. 1, par. 1.
Re allowances to Elevators by U. P. R. Co., 12 I. C. C. R. 85.
See also Crews vs. R. & D. R. Co., 1 I. C. C. R. 401, 1 I. C. R. 703, in which the Commission at first announced its conclusion that the Act did not sanction privileges of this nature.
National Wool Growers Case, 23 I. C. C. Rep. 151.
Spiegle vs. Sou. Ry. Co., 25 I. C. C. Rep. 71, 73.

Transit Case, 24 I. C. C. Rep. 340, 347, 349.
In re Transportation of Wool, Hides and Pelts, 23 I. C. C. Rep. 151, 171, 174.
In re Advance on Live Stock and Packing House Products, 22 I. C. C. Rep. 160, 174.
Washer Grain Co. vs. M. P. Ry. Co., 15 I. C. C. Rep. 147, 151.
Traffic Bureau of St. Louis vs. M. P. Ry. Co., 14 I. C. C. Rep. 317, 318.

See also—

In re Pipe Lines, 24 I. C. C. Rep. 1, 2.

Compare—

Douglas & Co. vs. C. R. I. & P. Ry. Co., 21 I. C. C. Rep. 97, 102.

§ 5. Carriers Must Not Unjustly Discriminate in Allowing Transit Privileges.

It is the duty of the carriers subject to the Act to Regulate Commerce, in affording proper transit privileges, to do so at reasonable charges and without undue discrimination. (See "Discrimination.")

Lumber from Louisiana to North Atlantic Points, 26 I. C. C. Rep. 186, 192.
Southern Illinois Millers Assn. vs. L. & N. R. R. Co., 23 I. C. C. Rep. 672, 678.
Van Natta Bros. vs. C. C. C. & St. L. Ry. Co., 23 I. C. C. Rep. 89, 90.

§ 6. Salting in Transit.

Salting in transit, when essential to the preservation and protection of property in transportation, is a service correlative with the services of refrigeration and ventilation. If the carrier undertakes to transport property, the nature of which renders salting in transit imperative to its preservation and protection, the law lays the duty upon the

carrier to afford the property such necessary protection. In this case it is a service, and for which the carrier may exact a proper charge.

Salting in transit, as a phase of merchandising in transit, is a transit privilege which the carrier is not required by law to allow nor the shipper entitled at law to demand, but when allowed must be open to all upon equal and reasonable terms. For it is the recognized rule that the carrier has the right at law to furnish all facilities essential to the transportation required by the Act.

A. T. & S. F. Ry. Co. vs. U. S., 232 U. S. 199.

§ 7. Milling in Transit; Manufacturing in Transit; Definitions.

The extent to which carriers have applied the milling in transit principle and the range of commodities now affected by transit rates are beyond common comprehension. The milling in transit principle had its inception in connection with the transportation of grain. It would be less a misnomer to denominate the principle that of manufacturing in transit, so extensively has this practice been permitted to prevail, not only as a necessity of commerce, but more often as a competitive inducement offered by carriers to increase their haul and revenue on specific kinds of traffic.

As said elsewhere herein, the Commission at first hesitated to place its sanction upon the practice, but so interwoven had it become in the commercial fabric of the country, that the Commission was forced to recognize its essential relation to transportation charges, and now it is included specifically in the amended Act.

Under the milling in transit theory the raw material pays the local rate into the point of manufacture; when afterwards the manufactured product goes forward, it is transported upon a rate which would be applicable to that

product had it originated in its manufactured state at the point where the new material was received for transportation, whatever has been paid into the mill being accounted for in this adjustment. Under this or some equivalent arrangement, at the present time grain of all kinds is milled and otherwise treated in transit; flour is blended, cotton is compressed, lumber is dressed and perhaps otherwise manufactured; live stock is stopped off to test the market. Whether the principle of milling in transit may be extended to a particular commodity will depend largely upon the facts.

Cent. Yellow Pine Assn. vs. V. S. & P. R. R. Co. et al., 10 I. C. C. R. 193.
See also Listman Mill Co. vs. C. M. & St. P. Ry. Co., 8 I. C. C. R. 47.

There is much to be said in favor of milling and manufacturing in transit, and there is much that can be said about the irregular and discriminatory practices that are invited and possible thereunder.

There is, of course, a limit to the products which can reasonably be included in the list of those which will be transported at the raw-material rate, either with or without a transit privilege. It might be reasonable to withhold transit privilege from a product that is essentially different from the raw material and from the other products of the same raw material which are accorded transit rates, as, for example, a liquid product of grain; but it is clearly discriminatory to single out one or more of several milled products of grain and withhold from it or them transit privilege which is granted at that or some other competitive point to other milled products of grain of substantially similar character, value and packing, and which are transported under substantially similar conditions, attended by

substantially equal risks, where there is competition between the millers of the grain either in marketing their product or in securing their material for milling.

Douglas & Co. vs. C. R. I. & P. R. Co., 16 I. C. C. R. 232, 244.

About 1890, the practice of milling grain in transit at Minneapolis was abandoned. For several years subsequent thereto, the milling industry was carried on under local rates on the inbound product. This reshipping system of rates amounts to doing business under open rates or in the open market and is distinguished from milling-in-transit under a through rate, to which an arbitrary charge is usually added for the privilege. In more recent years, transit at Minneapolis has been established on wheat from Omaha and Kansas City, which includes wheat from Nebraska and Kansas and also on grain moving under transcontinental tariffs, from points in Minnesota, including Minneapolis, Iowa, Nebraska, North and South Dakota and moving via unrestricted routes through the western gateways, viz., Ogden, Utah; El Paso, Tex.; Albuquerque and Belen, N. M.; Portland, Ore.; Salt Lake City, Utah; Los Angeles, Cal.; Colton, Cal.; Provo, Utah; Vancouver, B. C.; Seattle, Spokane and Tacoma, Wash.

Listman Mill Co. vs. C. M. & St. P. Ry. Co., 8 I. C. C. Rep. 47, 58.

See also—

Van Dusen Harrington Co. vs. C. M. & St. P. Ry. Co., 35 I. C. C. Rep. 172, 173.
Mason Bros. vs. S. P. Co., 28 I. C. C. Rep. 402.

§ 8. Reshipping Grain from Primary Grain Markets.

To the inquiry whether a carrier may lawfully cancel its local, reconsigning, proportional and other rates on out-

bound shipments of grain from a primary market like Kansas City, where no grain originates upon which the local rate would be applicable, and substitute for them a reshipping rate applicable on all outbound grain, the Commission approved the suggestion, but declined in advance to express approval of such reshipping rate when it makes less than the published rate from an intermediate point.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 57.

Chairman Prouty of the Interstate Commerce Commission, in his dissenting opinion in the Transit Case, in calling attention to the present tendencies in the making of rates on grain and grain products, speaking particularly of reshipping rates, said:

"Carriers now maintain from several important primary markets what are termed reshipping rates upon grain and the products of grain. These rates are based upon the assumption that the grain is moved by rail into the point from which they apply, but no evidence of that fact is required when the outmovement occurs, nor is any account taken of the point of origin in applying the reshipping rate.

"There can be no question that this system of rate making offers many desirable features. It has been approved by this Commission recently in two cases in which such rates from Chicago and from St. Louis were under consideration. We have recently suggested that similar rates should be established at Memphis and have ordered a rehearing of the case brought by grain interests at Sioux City, Iowa, with a view to putting in the same system of rates at that point.

"It is evident, however, that such in-and-out rates can not be established at all small interior points at which the milling industry is conducted, and the present practice is

to provide for these points by the establishment of a milling-in-transit privilege. Rates are so adjusted that from a given point of origin to a given destination the through rate is the same as the sum of the reshipping rates, so that the interior miller enjoys in theory the same rate as does his competitor located at a reshipping market.

"While, however, this is so in theory, the interior miller rests under certain serious disabilities, if the transit rules in the past enunciated by this Commission are to be rigidly adhered to.

"There is often, and perhaps generally, a milling-in-transit penalty which the miller at the reshipping point does not pay, and there is also the inconvenience of the various policing regulations, which of necessity are more or less burdensome.

"But the real difficulty under which the interior miller labors is in not being able to combine in the same carload transit and nontransit stuff and in being compelled to recognize in the use of transit both the point of origin and the point of destination.

"The producer of mixed feed at St. Louis, for example, ships out the entire carload at the reshipping rate which is applicable to the grain product, irrespective of the source from which the various ingredients have been obtained. The manufacturer of the same article at some point between St. Louis and the seaboard market can only apply his transit to a portion of the carload, and is obliged to pay, or rather has been obliged to pay, the less-than-carload rate upon the nontransit portion of the carload.

"In grinding wheat the interior miller must send approximately 70 per cent along as flour and the balance as offal, while at St. Louis the miller may send his flour to one point and his offal to another, irrespective of the kind of wheat which he grinds or the point from which he obtains it.

"The investigations of this Commission leave no reasonable doubt that if reshipping rates are to be applied at the principal markets, and if strict rules of transit like those enforced today in the southeast are to be maintained, the only possible result is to concentrate the milling industry at the primary market. This in my opinion is neither a wise nor a just thing. As an economic proposition I believe that rates of transportation should be so adjusted that the small miller at the interior point may operate under the same transportation charge as does his competitor at the great city. There is no reason in the transportation itself which justifies different treatment, and it is for the general interest of the country that industries should be diffused rather than unduly concentrated.

"To this end it is necessary that the interior miller should be permitted to do under transit in substance what the miller at the larger center can do under his reshipping rates. This I believe can be accomplished without discrimination and without injustice, and the decisions of this body recently made go far in that direction.

"We have recently held in Southwestern Millers' League v. A. T. & S. F. Ry. Co., 24 I. C. C. 552, that transit and nontransit articles may be sent from the milling point in the same car at the carload rate. This permits the interior miller to do precisely what the reshipping miller or dealer does.

"We hold in this proceeding that the manufacturer of mixed feed may have the benefit of transit upon the transit portion and may pay the carload rate upon the nontransit portion, provided of course that an entire carload is shipped. This again is precisely what the manufacturer of the same article at a reshipping point can do.

"In my opinion the same rule should be applied in the grinding of wheat. No distinction should be made in the

out movement between the flour and the by-product. There should be an arbitrary reduction, as suggested in the opinion, from the weight of the wheat to take care of the loss in milling, but when that is provided for I do not think any question should be made as to whether the out movement is flour or offal. The miller should be permitted to ship his offal where he will and his flour where he can best dispose of it at whatever transit rate he may be able to use from his in-billing.

"This certainly does involve a possible substitution of tonnage, and so does all milling in transit and all elevation in transit which does not require that the identity of the grain shall be preserved.

"It will not, in my judgment, result in harmful discrimination or in defeating the published rate. In actual result it is precisely what the miller at the reshipping point does, and his competitor at the interior point must have the same privilege if he is to continue to grind in competition.

"This is a practical question which should be dealt with in a practical and not in a theoretical way. The rule as above stated has been universally observed in the past, and the milling industry has grown up under it. It ought not now to be changed, when the effect of the change must be to drive the small miller out of existence, unless there is some actual necessity for the change.

"So far as I am informed, the serious discrimination in the past has been at these important markets like Chicago, St. Louis, etc., where the local consumption is large and where surplus billing was readily available. It has not been felt at the interior point. If now the difficulty at the great center can be taken care of, as I believe it should be, by the reshipping rate, then we may well allow at the small interior point a more liberal rule than would otherwise be possible."

Transit Case, 24 I. C. C. Rep. 340, 357-359.

The observations thus expressed by the Chairman were apt and timely in view of the elaborate discussion of the subject of transit by the majority of the Commission in the Transit Case, supra.

See also—Chapter II, Sect. 1; "Substitution of Tonnage at Transit Points."

§ 9. Dressing, Milling, and Treating Lumber in Transit.

One of the most important applications of the milling in transit principle has been with respect to lumber and timber. Subject to the same strict rules against unlawful substitution of tonnage and defeat of established rates, lumber may, under proper tariff provisions, be accorded transit privileges in the nature of dressing, milling, or sawing, grading, sorting, creosoting, etc., and the transportation charges adjusted on the basis of the through rate from point of production to ultimate destination. Under the general rule of the Commission such transit may not exceed a period of one year, except in the case of creosoting, where a transit period of 18 months has been approved.

The Commission has expressed the view that a transit privilege extending through a period of more than one year is prima facie unreasonable. Experience has shown, however, that as applied to the creosoting of lumber a period of eighteen months is not unreasonably long, provided the full local rates on the inbound material are required to be paid.

I. C. C. Confr. Ruling, Bull. No. 6, Rulings Nos. 204, 232.

§ 10. Yarding Privileges.

"Yarding" is a term applied to the unloading, stacking, sorting, grading, and drying of lumber and timber in transit.

Memphis, Tenn., is the largest wholesale hardwood mar-

ket in the United States, and enjoyed certain privileges in respect of yarding, grading, and sorting in transit not accorded to other lumber markets which draw their material from the same producing point. The Commission declared this condition a discrimination against Cairo, Illinois.

Sondheimer Co. vs. I. C. R. Co. et al., 17 I. C. C. R. 60.
Sondheimer Co. vs. I. C. R. Co. et al., 201 C. C. R. 606.

§ 11. Temporary Suspension of Transportation for Treatment or Reconsignment.

The temporary suspending of transportation for purposes of treatment or reconsignment would apparently include the "right of stoppage in transit," but a distinction exists between stoppage for milling or manufacturing in transit and mere stoppage for diversion or break or completion of load, although the former embraces the latter. Stoppage in transit in this section has reference to the right of stoppage by the owner of property or the consignor, during the bankruptcy of the consignee, and the stopping of a car to complete its load or to partially unload, and a special phase of stoppage such as the stopping of stock for feeding, etc. It is a special privilege which the shipper may not demand as a matter of right.

St. L. Hay & Grain Co. vs. M. & O. R. R. Co. et al., 11 I. C. C. R. 90.

The privilege of stoppage in transit is commonly spoken of as "stop-off," "stoppage in transit," and "right of stoppage in transit."

In the case of order shipments, the title or ownership of the property remains in the consignor until actual delivery to consignee. The consignor may stop his shipment so

long as he is the owner of it. In which case, he pays the local rate to the point of stoppage and the local rate to the reconsigned destination. In the case of straight shipments, the title of consignor constructively ceases when he delivers the shipment to the carrier, and the ownership from then on rests in the consignee, and, therefore, the consignee only may stop such shipment in transit and order its diversion. There is an exception to this latter rule in cases where it may come to the knowledge of the consignor after his shipment has gone forward and before delivery to the consignee, that the consignee has become bankrupt or insolvent. The consignor can only exercise this right of stoppage against a consignee who has become insolvent or bankrupt and of whose insolvent or bankrupt condition he was not informed at the time of the sale of the property. This is known as "right of stoppage in transit." This is not in the nature of a special privilege such as milling in transit, but the exercise of a lawful right of the owner of property to countermand previous consignment directions, and, for the protection of his property, to order the carrier to redeliver such property to him.

§ 12. Stoppage for Break or Completion of Load.

Carriers concede the privilege to shippers of certain special commodities in certain territories, to partially load a car at one point and move it to an intermediate point and complete the load, and then forward on the through rate from the initial origin point to final destination on the through rate, plus a nominal or reasonable charge for the stop-off service. In like manner stoppage may be made for partially unloading the contents of a car at an intermediate point under like conditions. Upon inquiry as to the legality of a practice permitting the stoppage of shipments of perishable commodities at points short of destina-

tion to partly unload, the Commission held that the practice is legal only when authorized under proper tariff rules.

I. C. C. Conf. Rulings Bull. No. 6, Ruling No. 233.

Under the requirements of section 6 of the Act tariffs shall contain the classification of freight in force and shall also state separately all terminal charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Furthermore, as the Commission has ruled that any service rendered beyond the ordinary receiving, transporting, and delivering of freight must be described in the tariff in its precise character, it is obvious that the stoppage of shipments in transit may not be availed of by shippers unless duly published, posted, and filed with the Commission in separate tariffs of the carrier or carriers allowing the privilege, except in the case of the exercise of the "right of stoppage in transit" by the owner of property in transportation under order consignment or upon the consignor's discovery of the legal incapacity of the consignee. This latter right arises out of the operation of the law of property right.

Act to Regulate Commerce, sec. 6.
I. C. C. Tariff Circular 18-A.

See also:

Re Rates and Practices on M. & O. R. R. Co., 9 I. C. C. Rep. 373.

§ 13. Stoppage of Stock in Transit.

The privilege of stopping hogs in transit shipped from western points to the East, in order that they may be

sorted and reconsigned under the through rate from point of origin, cannot be enforced against carriers in favor of any single point or shipper in the absence of lawfully established tariffs making such privilege open to the public at large.

Shiel & Co. vs. I. C. R. R. Co. et al., 12 I. C. C. R. 210.

In connection with the published privilege of feeding and grazing in transit, a carrier may lawfully provide in its tariffs that it will furnish feed at current market prices, and bill the cost thereof, together with an addition of 10 per cent or other reasonable percentage to cover the value of its services, as advance charges.

I. C. C. Conf. Rulings Bull. No. 6, Ruling No. 17.

The strict adherence to the letter of the tariff in the exercise of transit privileges is aptly illustrated by the Commission's ruling in a case where a consignor of sheep, which were being grazed in transit, was unable, because of a severe snowstorm, to get the sheep to the station before the grazing privilege expired according to the published time limit. The Commission held that the carrier cannot lawfully take the sheep forward on the rates which would have been applicable under the tariff, had the sheep been shipped within the time limit.

I. C. C. Conf. Rulings Bull. No. 6, Ruling No. 53.
Hoyt & Bergen vs. C. & N. W. Ry. Co., 32 I. C. C. Rep. 319-324.

§ 14. Cotton Compressing in Transit.

The compression of cotton at regularly established compressing points, under a contract for through shipment, has been approved and upheld by the Commission.

Re Alleged Unlawful Rates and Practices in Transportation of Cotton, 8 I. C. C. R. 121.

A railroad company is not guilty of unlawful discrimination or preference in violation of the second and third sections of the Act to Regulate Commerce, by receiving cotton at a southern producing point, moving it to an intermediate point and permitting compression at its own expense, and from such point of compress reshipping it to eastern points, when such an arrangement is in compliance with a recognized custom of the trade, of which all shippers may avail themselves, and where it does not appear that a shipper desired to ship any cotton from the producing point to the eastern points, or that he was compelled to pay a higher rate under similar circumstances.

Cowan vs. Bond, 39 Fed. Rep. 54.

§ 15. Cotton Floating and Compressing.

Floating cotton means to transport it to a compressing point and then forward it to final destination on the through rate from the point of production. Before the practice of floating cotton was inaugurated in the territory adjacent to Memphis, Tenn., cotton was sent to Memphis, there to be compressed and forwarded to points of consumption. Compresses were later established at adjacent points and the practice which followed of floating cotton at such points, made it possible to compress and forward the cotton to market as cheaply as could be done by sending it to Memphis. Under this system the cotton was delivered to the carrier at the producing point, from which it was carried to a compress point, where it was graded and compressed. It was then reloaded and carried to destination under the published through rate from point of origin. After compression, the cotton seldom if ever went forward in the same car. In many cases it was diverted to some other destination than that called for when the cotton was first received. The practice resulted

in a saving to the carrier. It also benefited the grower. Memphis contended that such shipments were not through shipments from point of origin, and should therefore pay the local rate from point of origin to point of compress and the published rate from the latter point to destination. This difference in the ultimate rate would have caused the cotton to go to Memphis.

It is said that the identical cotton does not pass over the entire route, but that substitution takes place at the compress point. This is certainly true. If a carload of cotton leaves Hernando for Boston, it is quite probable that no single bale of that cotton ever goes to Boston. If the car in which it came to Grenada reaches that destination, it is practically certain that it will be filled with other cotton, but this is in no way material. Every pound of Hernando cotton finally goes to some point beyond Grenada. It is true that a bale of cotton raised at Grenada may go from Grenada to Boston, by this process of substitution, at the Hernando rate, but in that event a corresponding amount of cotton from Hernando must go to some point upon the Grenada rate. However it may be in theory, there can in fact be no discrimination. Grenada cotton is bought upon and has the benefit of the Grenada rate, and cannot possibly obtain the benefit of any other rate, and Hernando cotton must go to a point beyond Grenada at some published rate.

The Commission held that the shipments from point of origin were through shipments and that the movement to the compress point, and the allowing of stoppage for grading and compressing, were strictly a part of the contract for through movement, and that the practice could not be viewed as in violation of the Act to Regulate Commerce.

Re Alleged Unlawful Rates and Practices in Transportation of Cotton, 8 I. C. C. R. 121.

CHAPTER II.

TRANSIT PRIVILEGES AND RULES—(Continued).

§ 1. Substitution of Tonnage at Transit Points.
(1) Amendments of 1910 Removed Question of Interstate Commerce Commission's Jurisdiction.
(2) The Transit Case.
(3) Commission's Jurisdiction Complete.
(4) Supplemental Report of the Interstate Commerce Commission.
(5) The Commodity and the Billing.
(6) Time Limit.
(7) Division of Grain Products.
(8) Mixed Feed.
(9) Cancellation of Billing for Loss of Weight in Milling or Treating of Grains.
(10) Transit of Lumber, "kind-for-kind" Rule.
(11) Commission's Attitude Toward Transit Rules and Regulations.
(12) Reasonableness of the 2-cent Charge.
(13) Discrimination.
(14) Conclusions.

CHAPTER II.

TRANSIT PRIVILEGES AND RULES—(Continued).

§ 1. Substitution of Tonnage at Transit Points.

On June 29, 1909, the Commission declared that a milling, storage, or cleaning-in-transit privilege could not be justified on any theory except that the identical commodity or its exact equivalent, or its product, is finally forwarded from the transit point under the application of the through rate from original point of shipment. It promulgated and put in force a rule, forbidding the forwarding, at a transit point on a transit rate of a commodity that did not move into the transit point on a transit rate, or the substitution of a commodity originating in one territory for the same or like commodity moving into the transit points from another territory. The effect of the rule was to prohibit any substitution that would impair the integrity of the through rate.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 203.

See also—

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 181.
I. C. C. Tariff Circular 18-A, Rule No. 76.

Referring to the above rule In re Substitution of Tonnage at Transit Points, 18 I. C. C. R. 280, the Commission said, at page 296:

"The hearing has failed to demonstrate that the Commission's ruling was too strict. It has demonstrated that various practices, as above outlined, have resulted in the violation of published rates, to the injury of shippers not taking advantage of such practices. Fraud can not be defined in this matter of abuse of transit any more than in any other line of activity. The Commission will not undertake to frame a code of transit rules. The traffic officials of the carriers have the duty and the responsibility under the law of initiating rates. They all agree in the statement that the system of rates devised by them is impracticable, and will result in great injury to carriers and business interests unless exceptions and privileges in the nature of transit are introduced. The Commission does not condemn the transit privileges as such, but it does hold that the responsibility for safeguarding and policing them, to the end that the lawfully published rates shall be collected, rests entirely upon the carriers. This is not saying that shippers will be excused in any case where they defeat published rates by any abuse of transit privileges. The duty of shippers to pay published rates is precisely the same as the duty of the carriers to collect such rates. Except in very rare instances, carriers give rebates or concessions only upon solicitation by shippers. In such case the liability of the carrier yielding to the solicitation is no greater or different than that of the shipper making it. The language of the law is:

" 'It shall be unlawful for any person, persons, or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to Regulate Commerce and the acts amendatory thereof, whereby any such property shall by any device whatever

be transported to a less rate than that named in the tariffs published and filed by such carrier as is required by said Act to Regulate Commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation whether carrier or shipper who shall knowingly offer, grant or give or solicit, accept or receive any such rebates, concessions or discrimination shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than one thousand nor more than twenty thousand dollars.' "

(1) Amendments of 1910 Removed Question of Interstate Commerce Commission's Jurisdiction. At the time the above holding was made with respect to substitution of tonnage in transit, the power of the Commission to so act was questioned not only by carriers but by shippers as well, many of the latter insisting that the Commission's decision, together with the stringency of Conference Rule No. 76-A, of June 29, 1909, would deprive them of the full enjoyment of their transit privileges. The Commission's interpretation of the law was clearly defined in the decision in 18 I. C. C. R. 280, and the detail of many of the condemned practices was concisely drawn, but, in spite of the earnest request of the Commission for the co-operation of shippers in the enforcement of the law, little improvement resulted in the practices attending the transit of grain and grain products, and the Commission instituted a second investigation.

(2) The Transit Case. The second investigation of transit practices by the Commission covered a much greater scope of territory and methods than were considered by it at the first hearing. Investigations, under the direction of the Commission, were carried on at all the important transit points in the United States with respect

to the transit of grain, and while the decision of the Commission in the 1912 investigation in no wise departed from the former interpretation of the law, it dealt with the several features of transit tonnage in a much more specific manner.

(3) **Commission's Jurisdiction Complete.** All question of the Commission's jurisdiction over the regulation of transit under the 1906 Act was removed by the amendments of 1910 to sections 1 and 15. By the extension of the meaning of the term "transportation" in the amended first section, to include the elevation and handling of property transported, the duty of the carrier to furnish such transportation upon reasonable request, and the power vested in the Commission to prescribe just and reasonable charges for such transportation, the duty of the carrier under section 6 to publish all facilities, privileges, rules, or regulations in any wise changing, affecting, or determining any part or the aggregate charge, the prohibition of departures from such published charges or the granting of any facilities or privileges not so published, the power of the Commission to deal with transit privileges is complete. But the intention of Congress that the Commission should wield this authority, is further amplified by the express provisions of section 15, as amended, which provides:

"That whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the trans-

portation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this Act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

It is impossible, as the Commission said in the Wool Case, 23 I. C. C. R. 1, 151, to compare the amended fifteenth section with the section as it was before the amendment of 1906, without reaching the conclusion that it was the intention of Congress to invest the Commission with full authority over interstate rates and all regulations or practices entering into or affecting those rates, which of course would be inclusive of transit privileges and regulations. The jurisdiction, therefore, of the Commission is full and complete as to all transit regulations and practices, and the Commission, under its power to deal with unreasonable or unjustly discriminatory practices or regulations,

is empowered to require a strict accounting of not only interstate transit and non-transit tonnage, but of local intrastate transit and non-transit tonnage as well, to the extent that the same may affect tonnage subject to interstate transit.

In the original transit case (18 I. C. C. R. 280), the Commission did not enter an order, but simply pointed out the illegal methods and practices, and interpreted the law. In the second case, the Commission dealt directly with the different practices involved in transit which resulted in departures from published rates. It found the following practices illegal and condemned them as defeating the plain mandate of the statute:

"Illegal transfer of billing to shipper who is not entitled to transit privilege thereon;

"Illegal transfer of grain not accompanied by the proper billing and the application to such grain of illegal transit;

"Applying transit to shipments which under the tariffs should be 'representative of the inbound movement,' but which were not so 'representative;'

"According transit to shippers far in excess of their transit credits;

"Allowing retention of billing after grain has been disposed of;

"Movement of transit and non-transit articles in the same carload without tariff authority therefor;

"Using transit after the expiration of the time limit named in the tariffs;

"Using expense bills covering grain destroyed by fire on other grain;

"Substitution of the products of one kind of grain for the products of another kind of grain;

"According transit privileges on non-transit ingredients of mixed feeds;

"Illegal use of surplus billing accumulated by reason of the difference between actual weights and minimum weights of the inbound movement, also accumulated by less-than-carload non-transit movements out, by movements to non-transit points, by local consumption, by movement out of water, by loss of grain in transit, and by shrinkage; the substitution of one grain for an entirely different grain; the movement out, pound for pound, of products which could not have been derived from the inbound grain, and with no allowance for offal; and

"The palpable manipulation of billing and defeating of published rates in cents per 100 pounds."

It must be borne in mind that the Commission, in dealing with the subject of substitution of tonnage in transit, did so in connection with the transportation of grain and grain products, although in doing so the general principles and rules apply with equal force to the transit of any commodity.

Acting upon the principle that the rules must contain sufficient protection to the movement to show readily whether the transaction is lawfully entitled to transit or not, the Commission promulgated the following rules:

"That the carriers shall be required to establish rules for the policing of transit privileges on grain and grain products which shall require:

"a. Certificates as to the transportation character of all grain contained in a transit house;

"b. That a daily report shall be furnished by the receiver of a transit privilege which shall state the required information as to the contents of a transit house, if any of said contents is accorded a transit privilege;

"c. That there shall be recorded with the policing authority of the carriers, within a reasonable time after the

shipments have been received at transit point, all paid expense bills;

"d. That all surplus billing shall be canceled absolutely at the close of each business day;

"e. That the railroad billing of the inbound and outbound movement shall describe with sufficient particularity the commodity upon which the transit privilege is accorded;

"f. That the outbound billing shall show full reference to the inbound billing;

"g. That the transit privilege shall be limited absolutely to one year, at the expiration of which time all privilege shall cease and full local rate, commodity or class, both into and out of the transit point, shall apply;

"h. That there shall be deducted an arbitrary loss in process of milling wheat of not less than 1 per cent of the weight of the wheat; in the malting of barley of not less than 16 per cent of the weight of the barley; in the drying of corn of not less than 10 per cent of the weight of the corn; in the shelling of corn of not less than 20 per cent of the weight of the corn; and in the cleaning and clipping of grains of not less than 1½ per cent of the weight of the grain; and

"i. That in according the transit privilege upon the products of grain milled or treated in transit, the policing authority shall be required to balance the outbound movement of the product against the inbound movement of the grain upon the basis of well-known average ratios of the products of the grain. This same general principle shall be applied to mixed feed."

The report of the Commission, in its second investigation of transit practices, so exhaustively reviews these conditions and comprehensively states the controlling principles that we are constrained to quote from it at length:

(4) Supplemental Report of the Interstate Commerce Commission.

"On May 3, 1910, our report In the Matter of the Substitution of Tonnage at Transit Points, 18 I. C. C. 280, was issued, setting forth in detail numerous departures from lawfully published rates caused by unlawful practices prevailing at transit points. All of such practices were condemned, and what was considered the correct interpretation of the law was clearly outlined and the co-operation of shippers and carriers was requested to the end that future violations might cease. As regards the handling of grain, there has been but little improvement. A further investigation, therefore, has been instituted, which forms the subject matter of this report.

"Prior to 1906 it was doubtful to what extent the Commission was authorized to go in the regulation of transit privileges. Since then all doubt may be said to have been removed by the amendments to the Act to Regulate Commerce, section 1 of which now provides that:

" 'The term "transportation" shall include * * * all services in connection with the * * * elevation * * * and handling of property transported; and it shall be the duty of every common carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor. * * * All charges made for any service rendered or to be rendered in the transportation of * * * property * * * as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.' * * *

"This section imposes upon the carrier the duty to provide and furnish at just and reasonable charges, transportation, including elevation and the handling of the prop-

erty transported. Section 6 then imposes upon the carrier the duty of publishing and filing with this Commission schedules stating all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such rates, fares, and charges, or the value of the service rendered to the shipper or consignee. It then prohibits departures from such published charges as well as the granting of any privileges or facilities other than those specifically set forth in its tariffs. This section further defines the carrier's duty, and in the following language of section 15 there is outlined the authority of this Commission to regulate transit privileges:

"'Whenever, after full hearing, * * * the Commission shall be of opinion that any * * * regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what * * * regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, * * * and (the carrier) shall conform to and observe the regulation or practice so prescribed.'

"As we said in the Wool Case, 23 I. C. C. 151, it is impossible to compare the fifteenth section as it stood prior to the amendment of 1906 with the same section today without reaching the conclusion that it was the intention of the Congress to invest this Commission with full authority over interstate rates and all regulations or practices entering into those rates and determining their value and avail-

ability to individuals or communities. As to their reasonableness or discriminatory effect, transit privileges, and all rules or regulations in connection therewith, are subject to the regulating authority delegated by the Congress to this Commission, and in the exercise of that authority rules and regulations susceptible of possible discriminatory or other unlawful application may be condemned and other rules or regulations prescribed, and to this end we may require a strict accounting not only of interstate transit and nontransit tonnage, but local intrastate tonnage as well. I. C. C. vs. Goodrich Transit Co., 224 U. S. 194, decided April 1, 1912.

"Conference Rule No. 76-A, promulgated June 29, 1909, was adopted following numerous complaints from shippers to the effect that their competitors at transit points were, by various substitutions, avoiding the payment of the published rates. The rule follows:

Substituting Tonnage at Transit Point.

"'A milling, storage, or cleaning in transit privilege can not be justified on any theory except that the identical commodity or its exact equivalent, or its product, is forwarded from the transit point under the application of the through rate from original point of shipment. It is, therefore, not permissible to forward from transit point on transit rate commodity that did not move into that transit point on transit rate, or to substitute a commodity originating in one territory for the same or like commodity moving into transit point from another territory, or to make any substitution that would impair the integrity of the tariff rate or rates. It is not practicable to require that the identity of each carload of grain, lumber, salt, etc., be preserved, but, it is not lawful to substitute at the transit

point any commodity of a different kind from that which has moved into such transit point under a transit rate or rule. That is to say, oats or the products of oats may not be substituted for corn, corn or the products of corn for wheat, nor wheat or the products of wheat for barley, nor may shingles be substituted for lumber, nor lumber for shingles, nor may rock salt be substituted for fine salt, nor fine salt for rock salt; likewise oak lumber may not be substituted for maple lumber, nor pine lumber for either oak or maple, nor may hard wheat, soft wheat, or spring wheat be substituted either for the other. These illustrations are given not as covering the entire field of possible abuses, but as indicating the view which the Commission will take of such abuses as they arise.

" 'To the end that abuses now existing at transit points may be eliminated, carriers will be expected to conform their transit rules and their billing to the suggestions of this rule. In the event of the failure of any carrier so to do, reductions of legal rates caused by transit abuses will be regarded as voluntary concessions from legal rates.'

"When this rule was promulgated it was the object of attack from various quarters on the ground that it was too strict, and that its enforcement would deprive shippers of the full enjoyment of transit privileges. For the purpose of determining whether or not there was need for a modification of this ruling, in 1909 and 1910 an exhaustive investigation was had, the result of which convinced the Commission that so lax had become the practices at some of the transit points that there was urgent need for a strict enforcement of a rule fully as stringent as No. 76-A, and no modification was made.

"As a result of the conclusions reached by the Commission in that investigation, stated in its report, 18 I. C. C. 280, known as Opinion No. 1247, certain of the carriers

undertook to make their tariffs naming transit privileges comply with the law.

"Speaking now with reference only to the transit rules respecting the transportation of grain and its products, there was some action on the part of the interests involved toward conforming to the law. Numerous conferences were held in various sections of the country by representatives of transportation and business interests, and since that time many new sets of transit rules have been filed with the Commission that in some respects are less open to censure than those previously in force. In some sections the matter was taken up vigorously by the carriers and shippers, and as a result, the rules made effective have, it is claimed, substantially met the requirements of the law; in other sections carriers drafted sets of rules which upon their face appeared to be commendable, but after delays and conferences with shippers the rules finally filed and published did not conform to the requirements. Some carriers, however, have failed to proceed in good faith or in a manner such as a proper respect for the regulating statute would naturally dictate, and such carriers and shippers have, by placing their own construction upon the Commission's Opinion No. 1247, dealing with transit, cited this opinion as authority for all manner of evil practices.

"The result is that today we find a condition whereby dealers and millers of grain and grain products, located in different parts of the country and competing with each other, are now subjected to transit rules and policing thereunder so diverse in character as to produce grave inequalities.

"The carriers in the Southeast assert with much earnestness that they have provided a method of inspection and policing of transit privileges on grain and grain products that is as nearly correct and in accordance with the law

and the views of the Commission as can be made. The general freight agent of the Louisville & Nashville Railroad, speaking for the carriers of the Southeast and the Mississippi Valley, in his testimony at the hearing stated the position of these carriers to be as follows:

" 'Shall these rules of ours, which are confessedly more rigorous than those in other territories, and shall this inspection of ours, which we believe to be more rigorous than the inspection in other territories, be continued, to the prejudice, I might say, of the people who are compelled to use them, or shall we loosen the rigidity of our inspection in order that the people located on our lines may be enabled to meet the competition in the territory that both sets of shippers serve? That is all there is to it, we say.

" 'There can not, in my judgment, be two sets of equally correct conclusions from the same premises. Either we are right in our rules or in our inspections, or we are wrong.

" 'When all is said, our rules can properly be considered as an interpretation. If we have interpreted too literally, too stringently, we, in connection with the grain men and millers, would be very glad indeed to have the Commission set us straight. * * *

" 'We believe that substantially uniform rules and practices should prevail throughout this entire country.

" 'We do not believe that when we interpret, as honestly as we can, these rules and principles, and it shall have been said that our interpretation is correct, that the people who honestly and fairly work under those rules, and commit themselves to that inspection and policing, should be thereby subjected to a distinct and positive disadvantage as compared with those who live under a different and less serious set of rules.'

"In this connection it was stated on behalf of certain of the respondents as follows:

" 'Can what we believe to be an improper and undue and unfair preference and advantage against which they labor as compared with other sections be removed? If it can we want to know whether it shall be removed by adopting a uniform set of rules in that territory the same as ours, **or whether we have the Commission's authority to take their rules and their methods of policing and establish them in our territory.'**

"To the extent that undue preference exists today in connection with the enjoyment of transit privileges, such preference is due to the fact that the transit rules themselves and the enforcement of the rules in one territory are not what they are in others. In other words, varying constructions have been placed upon the law in the promulgation of transit rules.

"In one section of the country we find large commercial interests subjecting themselves to transit regulations which have not been prescribed by the carriers but which have been voluntarily undertaken by the shippers for the purpose of bringing their business into conformity with the law.

"Many of the great grain-carrying roads of the Northwest, where the grain tonnage is very large, have left the matter of transit privileges open to unlawful practices by the shipper in defiance of the law, and it may be added that the investigations of the Commission disclosed the existence of almost universal unlawful practices in this territory.

"We do not regard the situation as one calling primarily for relief from unjust discrimination or undue preference under sections 2 and 3 of the Act. It is true that there are certain carriers extending from one territory into another

which have published transit rules in one section which restrict enjoyment of the transit privileges to a far greater degree than do the rules at other points on their lines in adjoining and competing territory. We must bear in mind these considerations, but we should not narrow the real question before us. The abolition of undue prejudice and unjust discrimination could readily be accomplished by uniform rules that would provide a minimum of restriction to the transit privileges, the result of which would promote the very practices which the Commission seeks to eradicate. The mandate of the law is plain. The sole purpose of the transit rules is to so regulate and police the application of the privilege that the aim of the law shall not be defeated. We must look to the transit rules which are filed with the Commission from this viewpoint, and accordingly as they do or do not accomplish their purpose, either in what they provide or fail to provide, they must stand or fall.

"Upon reopening the transit investigation the Commission fully realized that great diversity of views had arisen since it last dealt with the subject. No order was entered at the conclusion of the former investigation. The Commission had ascertained what the general situation was, and pointed out the evils, after carefully considering the tariffs and the practices prevailing. It was assumed at that time that having gone that far it could well leave the matter with the carriers to so frame their rules and police this transportation as to minimize to the smallest degree the opportunity upon the part of shippers to evade the law. It is primarily the duty of the carrier to do this.

"The grain business of the country is one of vast proportions and involves millions of dollars in revenues to the carriers. In transporting the grain and its products from the fields of surplus production to the consumers of the

South and the populous East, and for export, practically all of the carriers in interstate commerce participate. There is competition among them in the handling of this immense tonnage; this and probably other considerations have produced a marked diversity of views as to what transit rules and regulations should require.

"At the recent hearing in this proceeding all parties in interest were duly notified, given full opportunity to be heard, and were examined on behalf of the Commission as to the practices prevailing in connection with the operation of the transit privileges on grain and its products, and particularly as to what changes, if any, were necessary in order to eradicate unlawful practices. It was doubtless natural that the information and testimony obtained in this more or less voluntary manner failed to disclose to the fullest extent the infractions of the law which are possible and which are in fact going on under certain sets of rules now in force. It was noteworthy that particular localities and interests that are the beneficiaries of illegal practices under the transit privileges took no active part in the hearing, doubtless upon the theory that they had nothing to gain and something to lose by a change from the present status.

"In order that the Commission might have before it all sides of the question, it detailed a force of its examiners of accounts to investigate in various sections the conditions under which transit privileges are operative. This investigation covered the country quite generally and thoroughly.

"The former opinion of the Commission detailed at some length the illegal practices which were then admitted to be prevalent, and it will not be necessary to cover that ground again. It is sufficient to say that the conditions there disclosed have continued quite generally down to the present time throughout entire transportation territories.

Violations of the law shown in the present investigation include the following practices:

"The illegal transfer of billing to a shipper who is not entitled to a transit privilege thereon; illegal transfer of grain not accompanied by the proper billing and the application to such grain of illegal transit; the according of transit to a shipment which under the tariffs should be 'representative' of the inbound movement, but which was not so 'representative;' according transit to shippers far in excess of their transit credits; the permitting of retention of billing after grain had been disposed of; the movement of transit and nontransit articles in the same carload without tariff authority therefor; the use of transit after the expiration of time limit named in the tariffs; the using of expense bills covering grain destroyed by fire on other grain; the substitution of the products of one kind of grain for the products of another kind of grain; the according of transit privileges on nontransit ingredients of mixed feeds; the illegal use of surplus billing accumulated by reason of the difference between the actual weights and the minimum weights of the inbound movement, also accumulated by less-than-carload nontransit movements out, by movements to nontransit points, by local consumption, by movement out of water, by loss of grain in transit, and by shrinkage; the plain substitution of one grain for an entirely different grain; the movement out, pound for pound, of products which could not have been derived from the inbound grain, and with no allowance for offal; and the palpable manipulation of billing and defeating the rates in cents per 100 pounds.

"The Commission is thoroughly advised as to many of the illegal practices in vogue and shall proceed to take such action as the law provides for the punishment for and prevention of such unlawful practices.

"The former opinion stated that the Commission would not then undertake to prescribe a set of transit rules for the carriers. It was our view, and still is, that the carriers should initiate their own rules. However, after two elaborate investigations into the subject and several years of observation, we are convinced that there are certain fundamental restrictions that should be placed upon the extension of these privileges, and that we should therefore carefully weigh all considerations and enter an order requiring the respondents to incorporate in their tariffs naming transit privileges, such restrictions as we find shall be necessary in order to safeguard the application of the tariffs.

"These privileges had grown up, and the Commission found them in full vigor when the Act to Regulate Commerce became a law. In the earlier cases we hesitated, in the absence of power to regulate transit, to lend our approval to the practice. In fact, many carriers and shippers insisted that the practice be abolished altogether and that flat rates be substituted in lieu thereof. However, today transit has become a practice of such universal prevalence upon all the railroads that it has become as much the duty of this Commission under the law as amended to supervise and regulate these rules and practices as the rates, rules, and practices generally of all interstate carriers. It may be that absolute uniformity throughout the country in transit rules and regulations can not be brought about, but there can be established such uniformity as to insure that traffic will be conducted in accordance with the plain provisions of law. In other words, there must be uniform observance of the law, and all interests will then be placed upon a basis of equal opportunity, and abuses that are now justly complained of can be prevented.

"At the outset we have been confronted with the contention that the only substitutions which are regarded as

unlawful are those that defeat the rates. There are, of course, substitutions which defeat the rates and substitutions which may not. As a broad general proposition we hold that all substitutions are a violation of the law and must be eradicated or minimized to the last degree.

"The business man who employs the transit privilege looks upon it as a useful and in many cases an exceedingly profitable practice. Indeed, we recognize that in most instances transit is now a commercial necessity, because of its almost universal application and on account of the development which certain lines of business have taken entailing heavy investments.

"There is only one way to minimize violations of the law at transit points and that is by the adoption of unambiguous rules and the proper policing thereof to reduce the opportunity for such violations.

"We are told that our rule against substitution of white corn for yellow corn at a transit point should be rescinded, because there might be substitution of white corn for white corn that would violate the tariff. Similar criticisms have been insistently advanced with respect to other views which we have expressed on the subject.

"It will not do to say that a particular regulation is burdensome and unnecessary because the practice which it prevents might not defeat a through rate.

"This brings us at once to the conclusion that the rules must contain sufficient protection to the movement to show readily whether the transaction is a lawful one or not. We shall require that the rules be so framed as to give such information.

"Throughout this investigation considerable misunderstanding was manifest as to the nature of the commodity that lawfully might be moved out of a transit point under a transit rate. We can not appreciate the necessity for

this confusion, and are inclined to attribute it in most instances to an unwarranted misconstruction of our previous expressions. Viewed in the broad light of a remedial statute, a consideration of the purposes for which the Act to Regulate Commerce was enacted would clear up most of the apparent misunderstanding. The underlying principle of this Act is the elimination of unjust discrimination and extortion. The Act is an aid, not a hindrance, to commerce and must be given such reasonable construction as makes to that end. The theory under which a transit privilege is granted is that the inbound commodity will be subjected to certain treatment and afterwards moved out under the balance of the through rate. To express the ideal—the identical commodity, in its original or other commercial form, should move from the transit point.

"But commercial conditions render this impossible, and we must therefore look for such regulation as will subserve both the purposes of the Act and of our commerce. Manifestly such substitution as corn of one color for that of another, of spring wheat for winter wheat, or of other commodities analogous only by their comprehension under a generic term, is in accord neither with the spirit of the law nor the theory under which transit is extended. However, it sometimes happens that grains of different kinds may move into a transit point under the same transit rates, and such commodities, after being there milled, mixed, or otherwise subjected to treatment, move out to their final destination on the balance of the through rate which is the same for the mixed commodity as would obtain had they moved separately.

"Under these conditions the published rates are in no wise defeated and no preference is extended to one shipper over another. This we do not regard as a substitution,

and in our opinion the practice, if properly policed, is not in contravention of the principle of the Act. Where a commodity must of necessity lose its actual identity, as in the case of grain going into an elevator, it would be absurd to say that such identity must be preserved. Nor do we think this view properly subject to such interpretation as may be violative of the law, for it is incumbent alike upon shippers and carriers to see that there is actually on hand at the transit point sufficient and proper inbound tonnage to justify the outbound movement.

"The duty to properly and effectively police its transit privileges devolves primarily upon the carrier, and the interposition of no agency can relieve it of that responsibility. However, experience has demonstrated that because of negligence, inefficiency, pressure of other duties, or the enormity of the task, every station agent can not be relied upon adequately to assume the role of inspector, and bureaus have been established charged with the performance of this policing. We believe this to be the most practicable system yet devised and are inclined to favor its general adoption. Through a few of these bureaus an almost perfect check is kept of the inbound and outbound shipments, excess billing is canceled daily and daily and monthly reports are required from the transit houses; through others the system is not so thorough and leaves room for much improvement. At points where there is not sufficient business to justify the maintenance of an independent inspector, the agent of the carrier might also act as agent of the inspection bureau, but he should be subject to the frequent check and constant supervision of the bureau. What we say in approval of the inspection-bureau system must not be understood as transferring the responsibility of the carrier to the bureau. We recognize the establishment of these bureaus as agents of the car-

riers in the discharge of a duty imposed upon them by law."

(5) The Commodity and the Billing. "Unlawful practices are shown to result from a failure to regulate both the railroad billing upon which the transit commodity moves, and the commodity itself.

"The representative of the railroad delivers and receives the grain or products at a transit point, to and from the transit house. The carrier, through its inspection bureau, must follow the commodity taking transit throughout its pause at the point of transit. It remains an article of interstate commerce as long as it is subject to a transit tariff, and this period must be continuous. It therefore follows that the records of the transit house, in so far as they are subject to the tariff rules, are railroad records as defined in section 20 of the Act, and are subject to the control and inspection of both the respondents and the Commission. In order that both the commodity and the records of the transit house shall be properly policed, the carrier and the representatives of the Commission must have access at all times to the transit house, its contents, and its records, if the transit house contains any portion of a commodity upon which a transit privilege may be claimed. If the identity of the grain is lost in the transit house, its proper policing requires information concerning the entire contents of such transit house. It is our conclusion upon the record that the rules shall provide that at the time of each shipment certificates shall be furnished by those shipping out of a transit house as to whether or not the commodity is entitled to a transit privilege, and also whether the commodity has or has not theretofore been accorded a transit privilege, and if any commodity entitled to a transit privilege has been mixed with the contents of a transit house such certificates shall be furnished as to each

and every shipment therefrom. This requirement is vital for the proper application of both the inbound and outbound rates and also for the proper cancellation of surplus billing.

"Our inquiry has disclosed in many instances large amounts of surplus billing on hand, which were speedily canceled when our representatives appeared upon the scene. Where a transit house has surplus billing on hand for several million pounds of grain which has disappeared from its possession, as was disclosed in several instances by the Commission's inquiry, it is clear that the commodity has not been policed by the carrier in accordance with its plain duty.

"Upon the basis of our investigations it is our opinion that there shall be required a daily report from the transit house to the policing authority which should show at the close of business each day a classification of receipts and shipments of the total movement into and out of the transit house, if any of the commodity contained therein is to be accorded the right of transit. This report should show all tonnage handled through the transit house as follows: All grain and grain products handled, point of origin of the grain and destination of the product, and whether received or forwarded by rail, boat, wagon, or otherwise, which record must clearly show, in pounds, separately: Grain received by rail; grain received by boat; grain received by wagon; grain transferred from elevator to mill; grain products forwarded by rail (local or non-transit); grain products forwarded by boat (local or non-transit); grain products disposed of locally (by rail or wagon); grain products forwarded by rail (transit); grain products forwarded by boat (transit); grain products transferred; total tonnage on hand.

"It is fundamental that if any of the grain moving

through a transit point is to have transit privileges the total movement must be under the surveillance of the policing authority. For the purpose of enabling the police department to know that all the requirements of the rules in so far as the proper application of rates and the collection of charges on tonnage passing through the transit house, it is our conclusion that it is necessary for the rules to require that there shall be recorded with the policing authority all paid expense bills within a reasonable time after the shipment has been received. This record is further necessary in order to advise the bureau of the transfer of tonnage from one transit house to another. It is our further conclusion that the rules must require that the surplus billing, that is to say, all billing which does not represent grain actually on hand, shall be canceled absolutely at the close of each day. This daily cancellation down to the basis of stock on hand is vital and we shall insist on a literal adherence thereto. As was stated by the chief of one of the inspection bureaus:

" 'The protection I think comes in by keeping their expense-bills tonnage down to their stock on hand. If they were permitted to hold all of their expense bills, I think they could do a great deal of manipulating. Wherever we are policing these transit arrangements we have found enormous amounts of surplus expense-bill tonnage which we have canceled. I think that has done more good toward preventing illegal substitution and impairing the integrity of the through rate than almost any feature of our work.

" 'This view was strongly indorsed by the traffic witness on behalf of the Central Freight Association carriers.'

"Our investigations disclose that unlawful practices result from the failure of the carriers to require the railroad billing upon which the traffic moves and upon which

charges are collected to show in sufficient detail the exact character of the commodity transported. It is our conclusion that the railroad billing shall show sufficient detail to prevent unlawful substitution. That is to say, the billing should state whether white corn, yellow corn, mixed corn, white oats, red oats, mixed oats, hard wheat, soft wheat, etc. Where the billing does not show this information, it must be obtained by the owner in certificate form from some proper authority, or other satisfactory evidence must be furnished the carrier at or before the time when the commodity or its products are forwarded. It is our further conclusion that the outbound billing should show full reference to the inbound billing."

(6) **Time Limit.** "Upon the facts disclosed of record in this case, we are of the opinion and find that in order to prevent unlawful practices the tariffs shall contain a rule prohibiting the application of a transit privilege upon presentation of expense bills after a period of twelve months from the date of said expense bills.

"The important thing in this connection, however, is that the expiration of the time limit prescribed in the tariffs means that the commodity has then become localized; that all transit privileges accorded to the commodity shall absolutely cease, and that full local rates, commodity or class, shall be assessed for any movement of the commodity whatsoever. Furthermore, the rates theretofore collected upon the commodity shall after the expiration of the stated period be corrected to the basis of a movement wholly separate and apart from any idea of associating said movement with a transit privilege. In other words, the rates shall then be the local rates both into and out of the point of transit."

(7) **Division of Grain Products.** "In regulating the application of the transit privilege to the milled products

of grain in Central Freight Association territory a general provision broadly prohibiting substitution is all that the tariffs contain. This method has proven wholly unsatisfactory. Some millers regulate their billing in accordance with the products of the mill, while others do so upon the stated excuse that there is nothing in the rules which now gives to the policing authority any specific power in the premises, and that bureau finds itself with nothing upon which it can lay hold for the purpose of properly regulating the division of the tonnage. This situation obtains generally throughout the country, with the exception of the southern and Mississippi Valley territories.

"The transit rules in force in these territories provide for an arbitrary division of the products of grain. For instance, flour mills are required to ship out as the product of wheat 69 per cent of flour and 29½ per cent of offal, with an invisible loss of 1½ per cent. From grist-mills there may be shipped in transit hominy and meal, 74 per cent; offal, 24½ per cent; with an arbitrary invisible loss of 1½ per cent. Meal mills may ship 92½ per cent of meal and 6 per cent of offal, with 1½ per cent invisible loss.

"While no specific objection was advanced on behalf of the millers of this territory against this rule, except in so far as the lack of such a rule in other territories placed them at an undue disadvantage, the millers from other sections of the country strongly resist the theory of arbitrary percentages of products. The Commission gave this matter particular attention upon the recent hearings for the purpose of developing whether it was possible to dispose of this vexed subject upon an arbitrary basis, because, for obvious reasons, if such a treatment could be given it, we should require it to be done. Evils were disclosed where there was no arbitrary division of products

that would necessarily have been largely minimized had arbitrary percentages been required.

"The general average of the ratio of products that may be derived from a given quantity of grain of a particular kind when put through milling process is well known, as was demonstrated upon the recent hearings. The respondents and millers should take due and proper notice of these average ratios. From the necessities of the case a certain amount of leeway must be permitted in this regard which from our knowledge of the situation we think can temporarily be left with the policing authority, and we shall at this time refrain from ordering in arbitrary divisions of grains into products.

"In order that this important feature of transit shall not place undue restraint upon one section of the country or operate to the disadvantage of the smaller millers, and for the purpose of securing that uniformity of regulation to which the milling industry of the country as a whole is entitled and which it is our present aim to substantially prescribe, we find that the respondents should be required to embody in their tariffs a rule requiring the policing authority to daily balance the outbound movement of products against the inbound movement of the grain upon the basis of the well-known average ratios of the products to the particular grain, the actual divisions to be balanced at intervals not less than four times a year, quarterly. The millers will then know from the tariffs themselves that their billing will be canceled to correctly represent the weight of the grain from which the products could have been manufactured, and the responsibility will then rest directly upon the policing authority."

(8) Mixed Feed. "We are of the opinion that the same general principles as to the balancing of the material of grain account against the products moving from the **transit**

point shall apply uniformly to mixed feeds, based upon a knowledge of the industry. This question of mixed feeds has been recently passed upon in Memphis Hay & Grain Asso. v. St. L. & S. F. R. R. Co., 24 I. C. C. 609, wherein it was held that when a commodity was manufactured from materials more than 20 per cent of which was of nontransit material, it should no longer be entitled to transit privileges but should be considered a separate and distinct commodity and take a rate specifically prescribed therefor from the transit point. This disposition of the mixed-feed question greatly simplifies the application of transit thereto.

"In assessing rates upon mixed feed to and from the point of transit, it shall be proper to assess the rates upon the portion of the tonnage lawfully entitled thereto under the tariff upon the basis of the transit privilege, and the balance, if the shipment moves in carload quantities, may be assessed at the local carload rate from the transit point."

(9) Cancellation of Billing for Loss of Weight in Milling or Treating of Grains. "In certain transportation territories the rules provide that in the milling or treating of grain arbitrary deductions shall be made for what is termed the invisible loss that occurs in the process. This arbitrary deduction for wheat is in some tariffs 1 per cent, and in others 1½ per cent. In still other territories the matter is left open for an estimated deduction at certain periods of time from one month to one year, with a further provision that 'whenever' the mill is weighed up the matter should be again readjusted, either by the allowance of additional tonnage or cancellation of tonnage. In other instances we find the carriers relying upon the integrity of shippers who are expected to have this shrinkage in mind when certifying that they are entitled to transit. Upon

the recent hearing witnesses from all sections of the country were interrogated on behalf of the Commission with respect to this matter, and this record as a whole will justify the conclusion that there is uniformly a loss of weight in the process of milling wheat, which, though small, is nevertheless uniformly present and therefore can not be ignored in the transit rules. From actual figures it is shown that this invisible loss ranges as high as 2 per cent, and upon the record it is our conclusion that there should be a daily deduction in the milling of wheat of not less than 1 per cent of the weight of the grain milled. No other practical way has been demonstrated upon the record of actually reaching this feature, and we know that evil practices are indulged in where the deduction is not made, or where it is left entirely to estimates, weighing-up periods which may never come around, or where it is left to be voluntarily deducted by the shipper.

"The rules must also take notice of this loss in the manufacture or treatment of other grains. For example, it is shown in this proceeding that in the malting of barley there is a loss in weight on an average of 16 per cent of the weight of the grain; in the drying of corn the shrinkage ranges from 10 to 20 per cent of the weight of the grain and in the shelling of corn there is a loss of approximately 20 per cent; in the milling of corn there is a loss of from 1 to 2 per cent; in the cleaning and clipping of grains there is a loss of from 1½ to 2 per cent.

"Upon the record we are of opinion and find that in extending transit privileges upon the products of wheat a daily deduction of 1 per cent shall be made of the inbound weight of the wheat when said wheat has been manufactured at the transit point; that in extending a transit privilege upon malt there shall be a daily deduction from the inbound weight of the barley of 16 per cent; that in

extending a transit privilege upon corn that has been dried at the transit point there shall be a daily deduction from the weight of the corn of 10 per cent; that in extending a transit privilege upon corn which has been shelled at the transit point there shall be a daily deduction from the weight of the corn of 20 per cent; that in extending a transit privilege upon the products of corn milled at the transit point there shall be a daily deduction from the weight of the corn of 1 per cent; and that in extending a transit privilege upon grains that have been cleaned and clipped at the transit point there shall be a daily deduction from the weight of such grains of 1½ per cent; the actual loss to be balanced and deducted by the policing authority at intervals of not less than four times a year, quarterly.

"In view of the prime importance attaching to the question of proper transit rules and regulations, and the manifold details in which the whole subject is involved, we shall retain the present proceeding upon our docket for the purpose of making such further inquiries into the situation as a whole or into any particular feature of transit, and the proper regulation thereof, or for the purpose of entering such additional or amended orders upon the present record as may appear necessary.

"Carriers now maintain from several important primary markets what are termed reshipping rates upon grain and the products of grain. These rates are based upon the assumption that the grain is moved by rail into the point from which they apply, but no evidence of that fact is required when the out movement occurs, nor is any account taken of the point of origin in applying the reshipping rate.

"There can be no question that this system of rate making offers many desirable features. It has been approved by this Commission recently in two cases in which such

rates from Chicago and from St. Louis were under consideration. We have recently suggested that similar rates should be established at Memphis and have ordered a rehearing of the case brought by grain interests at Sioux City, Iowa, with a view to putting in the same system of rates at that point.

"It is evident, however, that such in-and-out rates can not be established at all small interior points at which the milling industry is conducted, and the present practice is to provide for these points by the establishment of a milling-in-transit privilege. Rates are so adjusted that from a given point of origin to a given destination the through rate is the same as the sum of the reshipping rates, so that the interior miller enjoys in theory the same rate as does his competitor located at a reshipping market.

"While, however, this is so in theory, the interior miller rests under certain serious disabilities, if the transit rules in the past enunciated by this Commission are to be rigidly adhered to.

"There is often, and perhaps generally, a milling-in-transit penalty which the miller at the reshipping point does not pay, and there is also the inconvenience of the various policing regulations, which of necessity are more or less burdensome.

"But the real difficulty under which the interior miller labors is in not being able to combine in the same carload transit and nontransit stuff and in being compelled to recognize in the use of transit both the point of origin and the point of destination.

"The producer of mixed feed at St. Louis, for example, ships out the entire carload at the reshipping rate which is applicable to the grain product, irrespective of the source from which the various ingredients have been obtained. The manufacturer of the same article at some point be-

tween St. Louis and the seaboard market can only apply his transit to a portion of the carload, and is obliged to pay, or rather has been obliged to pay, the less-than-carload rate upon the nontransit portion of the carload.

"In grinding wheat the interior miller must send approximately 70 per cent along as flour and the balance as offal, while at St. Louis the miller may send his flour to one point and his offal to another, irrespective of the kind of wheat which he grinds or the point from which he obtains it.

"The investigations of this Commission leave no reasonable doubt that if reshipping rates are to be applied at the principal markets, and if strict rules of transit like those enforced today in the southeast are to be maintained, the only possible result is to concentrate the milling industry at the primary market. This in my opinion is neither a wise nor a just thing. As an economic proposition I believe that rates of transportation should be so adjusted that the small miller at the interior point may operate under the same transportation charge as does his competitor at the great city. There is no reason in the transportation itself which justifies different treatment, and it is for the general interest of the country that industries should be diffused rather than unduly concentrated.

"To this end it is necessary that the interior miller should be permitted to do under transit in substance what the miller at the larger center can do under his reshipping rates. This I believe can be accomplished without discrimination and without injustice, and the decisions of this body recently made go far in that direction.

"We have recently held in Southwestern Millers' League vs. A. T. & S. F. Ry. Co., 24 I. C. C. 552, that transit and nontransit articles may be sent from the milling point in the same car at the carload rate. This permits the interior

miller to do precisely what the reshipping miller or dealer does.

"We hold in this proceeding that the manufacturer of mixed feed may have the benefit of transit upon the transit portion and may pay the carload rate upon the nontransit portion, provided of course that an entire carload is shipped. This again is precisely what the manufacturer of the same article at a reshipping point can do.

"In my opinion the same rule should be applied in the grinding of wheat. No distinction should be made in the outmovement between the flour and the by-product. There should be an arbitrary reduction, as suggested in the opinion, from the weight of the wheat to take care of the loss in milling, but when that is provided for I do not think any question should be made as to whether the out movement is flour or offal. The miller should be permitted to ship his offal where he will and his flour where he can best dispose of it at whatever transit rate he may be able to use from his in-billing.

"This certainly does involve a possible substitution of tonnage, and so does all milling in transit and all elevation in transit which does not require that the identity of the grain shall be preserved.

"It will not, in my judgment, result in harmful discrimination or in defeating the published rates. In actual result it is precisely what the miller at the reshipping point does, and his competitor at the interior point must have the same privilege if he is to continue to grind in competition.

"This is a practical question which should be dealt with in a practical and not in a theoretical way. The rule as above stated has been universally observed in the past, and the milling industry has grown up under it. It ought not now to be changed, when the effect of the change must

be to drive the small miller out of existence, unless there is some actual necessity for the change.

"So far as I am informed, the serious discrimination in the past has been at these important markets like Chicago, St. Louis, etc., where the local consumption is large and where surplus billing was readily available. It has not been felt at the interior point. If now the difficulty at the great center can be taken care of, as I believe it should be, by the reshipping rate, then we may well allow at the small interior point a more liberal rule than would otherwise be possible."

The Transit Case, 24 I. C. C. Rep. 340, 342.

(10) **Transit of Lumber, "Kind-for-Kind" Rule.** In the more recent case of National Casket Company vs. Southern Railway Company, 31 I. C. C. Rep. 678, the Commission gave exhaustive consideration to the transit of lumber. It was said, beginning at page 678:

"The 21 joint complainants in this case are severally engaged in the business of assembling, assorting, manufacturing, and shipping lumber, and have their respective place of business at Asheville and other towns in western North Carolina. The complaint alleges (1) that defendant's charge of 2 cents per 100 pounds upon shipments of lumber handled under transit arrangements at the points involved is excessive, unreasonable, and unduly discriminatory; (2) that defendant's rules and regulations governing such transit arrangements are impracticable, unreasonable, restrictive and burdensome, and result in such a high cost per transit car as to practically destroy or nullify the privilege. The prayer is for an extension of the destination territory to which the transit shall apply, less rigorous and restrictive transit rules, and reparation upon all ship-

ments moving within the past two years, based upon a maximum charge of 1.5 cents per 100 pounds for the transit privilege.

"The territory in which the traffic originates may be roughly described as all that territory on the Southern Railway west of Asheville from which lumber shipped to the east may be given transit privileges at the points involved herein, and all territory on the Southern Railway east of Nashville, Tenn., from which lumber may be drawn to the points in question, there given transit privileges and reshipped west, or to north of the Ohio River. The mountainous district of western North Carolina comprises the major portion of the territory described and produces 30 to 50 different kinds of timber, of which 20 or more of the so-called common kinds are produced in mercantile quantities. In addition to the common varieties there is a small supply of higher grade woods, such as cherry and walnut. The depletion of the forests has progressed to such an extent that the best timber is practically gone; only the lower grades are now obtainable, and these are cut at distances averaging 8 miles or more from the railroad.

"Transit privileges have been accorded to lumber dealers in this section for several years, and were instituted in the first instance to enable lumbermen on defendant's line to meet the competition of mills on the Norfolk & Western Railway to which lumber was being drawn through the Bristol gateway from points of origin on defendant's line. One of the earliest transit points on defendant's line was Johnson City, Tenn. It became a transit point January 1, 1897, and the tariff provided for a charge of 2 cents per 100 pounds in addition to the through rate, with a minimum of $5 per car. December 24, of the same year, a similar arrangement was made at Asheville. This is said

to have been the first transit arrangement made by the Southern Railway in North Carolina. Since that time the arrangement has been extended to some 74 points on its system. At all points on defendant's line with which complainants are in competition the charge is 2 cents per 100 pounds above the through rate, except at Bristol, Johnson City and Newport, Tenn., where 1.5 cents is the charge applied under our orders in the Spiegle & Co. cases, 19 I. C. C. 522, 25 I. C. C. 71, and Bristol Door & Lumber Co. vs. N. & W. Ry. Co., 25 I. C. C. 87.

"Transit privileges on lumber on defendant's line are limited with respect to the destination of the traffic, to Ohio and Mississippi River crossings, for beyond; to Virginia cities, for beyond; and to the south Atlantic ports. The arrangement was adopted and extended for the purpose of enabling lumber shippers in the south to draw lumber into the transit points from the surrounding territory and reship it in competition with lumber from other sections of the country to the principal consuming markets in other territories, and through the south Atlantic ports to coastwise and foreign destinations.

"The early rules and regulations governing transit were generally lax. Not until after we made our investigation and report in In the Matter of Substitution of Tonnage at Transit Points, 18 I. C. C. 280, was any close attention given by carriers to the unlawful practices connected with transit privileges. Thereafter defendant adopted transit rules and regulations looking to the discontinuance, so far as possible, of unjust discriminations and preferences, and adopted more rigorous rules for policing transit in respect of all commodities accorded transit.

"On February 1, 1911, seven months after the Commission issued its first report in the Transit case, supra, defendant established a tariff governing transit on lumber,

applicable uniformly on its line. Conformable to our findings and suggestions in that case this tariff did not permit substitution of one kind of lumber for another, but did permit the shipment from transit point of a mixture of different kinds of lumber in carloads when inbound tonnage in kind was surrendered in proportion to such outbound mixture.

"The rule against substitution was considered burdensome by shippers in western North Carolina, and they set about to obtain and were successful in procuring a modified rule which virtually permitted substitution of one kind of lumber for another. Defendant asserts that this modified rule was put in tentatively and experimentally, and upon the understanding that if it should be found to discriminate against other shippers or localities, or be disapproved by the Commission, it would be withdrawn. Complainants deny this. However, whether or not there was such an understanding is immaterial to the issues here. The fact is that defendant established the following rule, effective September 15, 1911, and continued it in effect until February 6, 1913:

" 'Rule 13 (for application see Note 2):

" '(A) Expense bills surrendered must be representative of the property reshipped and must correspond in description.

" '(B) Walnut, cherry or cedar lumber, on which the through rate is the same for the three kinds, may be reshipped in straight or mixed carloads on inbound expense bills covering either walnut, cherry or cedar.

" '(C) Hemlock lumber, when the through rate is lower than on lumber, other than walnut, cedar, and cherry, may be reshipped on inbound freight bills covering hemlock lumber.

" '(D) Ash, chestnut, elm, oak, pine (and hemlock when

the through rate is the same as on ash, etc.), and other kinds of lumber, except walnut, cedar and cherry, may be reshipped in straight or mixed carloads on inbound freight bills covering either kind included in this group.'

"Defendant asserts that the extension of this liberal rule to the shippers of western North Carolina did, in fact, evoke criticism and charges of undue discrimination, which were voiced by other lumber-shipping interests at subsequent hearings in the Transit case, supra; that it was thereupon withdrawn and the rigid requirement of surrender of strictly representative inbound billing against outbound shipments was restored.

"Rule 13, while in effect applied only at Bristol, Greenville, Johnson City, Morristown and Newport, Tenn., and points in North Carolina and Virginia. At all other points on defendant's lines the following rule was contemporaneously applicable:

" 'Rule 14 (for application see Note 3). Expense bills surrendered must be representative of the property reshipped and must correspond in description; for example, ash lumber for ash lumber, cypress lumber for cypress lumber, elm lumber for elm lumber, oak lumber for oak lumber, pine lumber for pine lumber, etc.; except that a shipment consisting of a mixture of different kinds will be billed as a mixture and tonnage in kind surrendered in proportion to such mixture.'

"Upon the cancellation of Rule 13, Rule 14, which is commonly known as the 'kind-for-kind' rule, became, and still is, applicable at all points on the Southern Railway.

"As an additional safeguard defendant's tariffs, since August 23, 1912, have provided:

" 'Rule 16-B. When lumber is reshipped, original paid expense bills representing not less than the quantity of lumber and weight tendered for reshipment must be can-

celled and retained by the agents of these companies, and the agent will then refund reshipper out of the charges into transit point on amount arrived at by applying to the rebilled shipment the rate per 100 pounds paid into transit point, minus 2 cents per 100 pounds, with a minimum deduction of $6 per car. A new bill of lading will then be issued at the lawful tariff rate on the kind or kinds of lumber reshipped from original point of origin of shipment to final destination in effect on the date of the shipment to transit point.'

"In testimony and upon brief complainants state that the issue involving defendant's rules governing the operation and policing of the transit is the one in which they are most concerned. These rules, they allege, are so unfair and impracticable as to practically nullify or destroy the benefits which the transit is presumed to confer. In fact, the restoration of Rule 13 or its substantial equivalent is the principal thing for which complainants contend.

"The requirement of Rule 16-B in respect to quantity is known in common parlance as the 'footage' rule or basis. Complainants' objections to the present rules are based principally upon the alleged impracticability of the 'kind-for-kind' rule; the alleged unnecessary use of such a rule in connection with the 'footage' and weight rule; and the alleged increased cost or expense of transit resulting from shrinkage in weight and the loss of the benefit of the transit rate upon some of their tonnage, due, it is contended, to the unreasonable restrictions of the rules. The loss of weight resulting from dressing and manufacturing is dependent upon the process employed. The loss in assembling and assorting is only such as results from the drying of the green lumber. The restrictions complained of are the result of progressive development of the rules

with a view to safeguarding the transit transaction from abuse through substitution or other illegal devices.

"Those complainants who are engaged in assorting and assembling lumber are the ones who most strongly contend that the 'kind-for-kind' and 'footage' rules have the effect of arbitrarily depriving them of refunds on much outbound tonnage to which they should be entitled. They insist that these rules can not be applied to the operation of an assorting plant; that such enterprises can not be maintained under the rules, and that their continued application will either drive assorting plants out of business or necessitate their removal to rate-breaking points.

"In respect to alleged increased cost of transit under the present rules one complainant testified that during a period of 10 years, up to and including 1912, the average cost at his assembling and assorting plant had been $12.59 per car, but that it had increased under the new rules to $19.20 per car. The same witness, being himself chiefly interested in the assembling and assorting business, testified that the average cost per car to other concerns engaged chiefly in milling lumber was under the old rules $14.99, which, on an average car of 40,000 pounds, equaled 3.5 cents per 100 pounds. The cost under the present rules is not stated nor is the detail of the amounts given. The amounts stated represent the difference between the aggregate charges paid on the total weight of all inbound shipments, transit and nontransit, and the aggregate refunds received on the weight of all outbound transit shipments, and are exclusive of all money items not directly connected with freight charges. The amounts are ascertained by including in cost of transit the charges paid on all weight shipped in, regardless of whether or not the inbound tonnage is subsequently transit. In other words, complainants compute the cost of transit by including the charges

paid on all weight subsequently 'lost' at the transit points, which includes loss resulting from any of the following causes: (1) Dressing and the various manufacturing processes; (2) drying; (3) lapse of expense bills after 12 months; (4) shipments disposed of locally or reshipped to nontransit points; (5) cancellation of tonnage on specific kinds of wood weighing less than 1,000 pounds; (6) alleged unfair and inconsistent interpretation of the rules and in computing refunds upon the quantity or footage basis.

"We turn for the moment to the question of losses sustained by reason of the last two causes assigned. Complainants offered much testimony and show in much detail precisely how the enforcement of defendant's rules results in the cancellation of tonnage upon which they claim they are reasonably entitled to transit rates and illustrative cases are submitted to support these contentions. Without dwelling at length upon the details of these illustrative cases, we say in passing that as to one or more of them it is not clearly established that the shipments were entitled to transit, even to the extent it was granted. However, one of the shipments apparently moved under the operation of old Rule 13, for the restoration of which complainants are contending. The shipper substituted billing covering light basswood inbound for heavy oak outbound, and under the application of Rule 13 in connection with the 'footage' rule he suffered a loss of weight. Assuming that the shipment was entitled to transit, this was an instance in which substitution was of doubtful value to the operator.

"Loss of weight at a transit point is necessarily incident to the conduct of business under transit. The unit of the transit shipment is the car of manufactured product or assorted stock shipped out from the transit point. The benefits of transit can properly be extended only to the

commodity reshipped in accordance with the terms and conditions stated in the carriers' tariff. The loss of weight on account of any of the first four causes assigned is purely a commercial loss. It would be improper to allow a refund of inbound freight charges upon any of the weight thus 'lost' or dissipated at the transit point.

"The utility of a transit arrangement is primarily a question for the shipper, to be determined by ascertaining whether or not it can profitably be availed of under a reasonable charge for the service rendered, and this contemplates a charge which will pay the cost of the service and return a fair profit. S. Ry. Co. vs. St. Louis Hay & Grain Co., 214 U. S. 297, 301.

"Rule 12 provides for the issuance of credit slips in exchange for expense bills covering inbound tonnage. The lumber covered by such credit slips is entitled to be shipped out at any time within the life of the expense bill covering the inbound shipment—

" 'Except that no such credit slip shall be given for that weight which is lost through the process of dressing, drying, etc., as provided in Rule 8, and excepting further that no such credit slip shall be given for lumber and average proportion of weight less than one thousand (1,000) pounds.'

"Formerly the minimum weight of lumber for which a credit slip would be given was 5,000 pounds.

"Some of the complainants allege that, under the operation of the rules, they are unable to utilize their oldest expense bills and that they lose much tonnage on which they would be entitled to refund within the life of the expense bill, because of the requirement for surrender of billing covering a like kind of lumber and quantity equal to that shipped out. The only reason assigned is that the oldest billing 'will not fit,' by which is meant, as we under-

stand, that the oldest billing which the transit user has on hand and which will lapse soonest is, in all probability, for a different kind of wood than that contained in the outbound shipment. This is the real point of complainants' objection to the 'kind-for-kind' rule. Under a rule permitting the surrender of one kind of wood inbound for a different kind outbound, complainants have no difficulty in using their oldest billing.

"In fact, the transit users can ship out under the rules in effect today all of the lumber that they could have lawfully shipped out under Rule 13. Indeed, they can ship out more, since the minimum weight for which a credit slip will now be issued is 1,000 pounds, whereas it was formerly 5,000 pounds.

"If this present minimum were eliminated so that a credit might be issued for any quantity of lumber, no matter how small, that might be received in a mixed inbound car, there would be no limitation, so far as the kind-for-kind or footage requirements are concerned, upon the transit users' right to reship all inbound lumber not 'lost' in processing. We are inclined to think that any difficulty which complainants may have in respect to finding expense bills which will 'fit' must arise from one of two causes: Either the transit user has no inbound billing covering the kind of wood shipped, which is lawfully applicable to his outbound shipment, or, by reason of his method in filing and recording expense bills and credit slips, he is unable to readily find billing that would be applicable.

"There are no track scales at Azalea, and cars loaded there for eastbound movement are weighed on defendant's scales at Marion. Complainants at Azalea experience delay in getting the scale weights. Sometimes it is impracticable to know at the time of shipment the exact

quantity and weight of the outbound shipment. An estimate of the quantity and weight of such shipments is made at Azalea for billing purposes, and the cars are subsequently weighed at Marion and the weights are reported back to the agent at Azalea, the billing point. It appears that there is unwarranted delay in reporting back the scale weights, and if they show a substantial excess over the estimated weights defendant refuses to permit the filing of additional inbound billing to cover such excess but charges for it at local rates from the transit point, even though the entire shipment consists of transit lumber upon which shipper would be entitled to transit refund. It is unjust and unreasonable not to promptly report these weights to the billing office and give the shipper opportunity to surrender additional billing, which, under the rules, he might properly have surrendered in the first instance. If defendant has inadequate facilities at Azalea it must see to it that the shipper is neither injured or prejudiced thereby.

"Complainants assert that the reports and bookkeeping required under the present rules are so burdensome and involve such increased expense upon the shippers as to be unreasonable. The inspection bureau which supervises the operation and policing of all transit under defendant's rules has prescribed certain forms of reports designed to promote the efficient operation and enforcement of the rules. These forms comprise one to be rendered monthly, and one to be rendered daily if lumber is received, loaded out, disposed of locally, or billing is cancelled for any reason. The third form is known as a credit slip. This given to the shipper in exchange for the expense bill covering an inbound shipment of lumber when only part of the lading is to be shipped out, or, when a transit user ships in a mixed carload he may exchange the expense bill

for credit slips, one for each kind of lumber in the car, showing the footage and the proportionate weight thereof. These credit slips are signed by the local inspector of the inspection bureau and are, as we understand it, made out by the inspector and involve no work on the part of the transit user.

"The fourth form is designed to be a record of the rail movement of lumber. The form which is intended for use for each car contemplates a record of the contents and quantity inbound and the subsequent disposition of the contents. That is, whether the lumber is disposed of locally or, if shipped out, the time and destination of the shipment. The shipper is not required to make this report, but the manager of the inspection bureau testified that the form has proven useful and convenient to the shippers, is well adapted to certain of their needs, and that many of them preferred to make out the report. The fifth form is a certificate that the shipment tendered is entitled to the transit rate. This certificate is required by the tariffs and is usually stamped as an indorsement across the face of the bill of lading, the indorsement being filled out and signed by the shipper.

"The principal objection is to the daily report, and it is the one which involves the most labor. This report is to be made for each kind of lumber received or shipped out. Since there may be several different kinds of lumber in the inbound car, it is necessary to make as many different reports. When lumber is shipped out additional entries must be made upon the report.

"One witness estimated that the possible expense of making all the reports and entries necessary in connection with the handling of a transit car of lumber would amount to $1.80. He stated that if the reports were made as required by the inspection bureau, daily and monthly and

in connection with every shipment moved, it would involve the entire time of one man. He admitted, however, that they had been able to get along so far without employing or paying a man especially for that work. Objection seems to be made to each and every report. It should be stated that under the rules formerly in effect it was necessary for transit users to make certain reports and keep certain records. Defendant avers that the reports required are not more elaborate than is necessary for the purpose, and states that it would be willing to adopt any other rule or form of reports that would be less burdensome and at the same time safe and efficient. Complainants, however, offer no substitute unless we may so consider their suggestion that a report might be made once every 90 days.

"We gather from the testimony that any substantial increase in clerical work in making the reports and keeping the records upon the forms prescribed over and above that formerly required results from the requirement of separate reports for each kind of wood. The keeping of such a record is perhaps essential to efficient enforcement of the kind-for-kind provision of the rule, but the testimony leaves us in some doubt as to whether there is not some duplication of work.

"We may remark that when, as here, the timber is of many kinds, and several kinds of lumber take the same rates, we see no impropriety in a tariff which permits the shipping of those several kinds of lumber at carload rates in straight or mixed carloads to and from the transit point. Under such a tariff the shipper would, of course, be obligated to confine his outbound shipments under transit to lumber coming from the points from which, and of the kinds to which, the transit rates apply.

(11) **Commission's Attitude Toward Transit Rules and Regulations.** "As the result of disclosures of extensive

unlawful practices revealed by the general transit investigation, we endeavored to aid both carriers and shippers by outlining with some degree of particularity rules and regulations designed to minimize or eliminate such practices. Those unlawful practices were due in part to loosely drawn rules, but in the main were due to devices resorted to by shippers to secure advantages in rates, which devices were generally known to and winked at by the carriers. Those rules and regulations were either suggested in the several reports in the Transit case or were embodied in Rule 76 of the Commission's tariff circular. When, later, the impracticability of having uniform rules applicable to the varied and varying conditions in different parts of the country became evident, and for other reasons recited in our last report in the Transit case, we rescinded those rules and withdrew our suggestions, insisting, however, that the carriers must show clearly in their tariffs what they would provide and what the shipper might demand under their transit rules; that the rules be enforced alike as to all users thereof; and that the practices thereunder must be in accord with the plain intent thereof. 26 I. C. C. 204.

"Complainants seem to assume that by withdrawing these rules and suggestions we reversed the views which we had theretofore expressed regarding the impropriety and unlawfulness of many of the practices which had been under investigation. Upon brief, counsel for complainants contend in respect of defendant's action in reinstating and maintaining the mixing privilege, so called, allowed by Rule 13:

" 'Notwithstanding the fact that its transit rules are based upon the opinions mentioned, it has not seen fit to change its tariff to meet the views of the Commission as expressed in opinion No. 2188 (26 I. C. C. 204), which

destroyed the effect of the opinions upon which its transit tariffs are based.'

The brief fails to present a full statement of our views upon which complainants rely. After a résumé of the proceedings in the Transit case, including a statement of the suggestions coming from separate and independent conferences of both shippers and carriers and a recital of the fact that both urged revocation of Rule 76 and tendered a substitute therefor which we stated amounted to a request for the authorization of substitution, we said at page 209:

" 'We think that the time has come to take a stand upon this general subject which may appear to be somewhat inconsistent with our attitude in the past. However that may be, we intend that the views which we now express shall supersede all that has been promulgated heretofore on the subject of transit privileges and their regulation in so far as it may have constituted a rule of action.'

"And at page 210 we said:

" 'Upon careful consideration of the whole matter it is our conclusion that we should accede to the request that Rule 76 be cancelled, but, on the whole, we do not think that it would be wise, even if within our province, to publish as a ruling of the Commission such a requirement as has been proposed. It is our best judgment that the policy of making orders, drawing rules, or expressing views as to what would or would not, under certain conditions, be considered as a violation of law as to transit privileges, be now departed from by us, as the carriers are charged with the duty of initiating their rates, regulations and practices under their own responsibilities and liabilities imposed upon them by the act, subject to appropriate action on the part of the Commission or the courts in the event

that the rates, regulations or practices are found to be violation of law.'

"There is no warrant for assuming that we acceded to the suggestion that substitution of one kind of lumber for another may lawfully be made unless it is authorized by the tariff, or that we have receded in any degree from the opinions hitherto expressed touching the unlawfulness of any practice or device not authorized by the tariff by which the integrity of a through rate is impaired; unjust discrimination or undue preference is given or secured; or the requirements of the law or the tariff are in any wise evaded.

"The law is as binding upon the shippers and the carriers as it was before we rescinded Rule 76 and withdrew our suggestions. The obligation to observe its letter and spirit rests no less lightly upon all parties subject to its provisions. The penalties for its violation are unchanged. It is now, as it was then, the duty of the carriers to initiate and properly police their transit arrangements. It is now, as it was then, the duty of the shipper to conform his operations to the requirements of the law and of all reasonable rules and regulations of the carrier designed to insure the observance of the law. Property treated or stored in transit necessarily passes temporarily out of the possession of the carrier and into the custody of the shipper.

"That there may be no excuse for misinterpretation of the Commission's attitude upon this subject, and for that reason solely, we direct attention to the fact that there are now pending in the Federal courts several criminal prosecutions approved by this Commission against shippers charging them with unlawful substitution of lumber or grain in transit. Furthermore, the courts have recently given judicial sanction to the Commission's views in Grand

Rapids & Indiana Ry. Co. vs. U. S., 212 Fed. 577, and Nichols & Cox Lumber Co. vs. U. S., 212 Fed. 588. In these cases the circuit court of appeals affirmed the judgments returned in the lower courts where the railroad company was found guilty of giving, and the shippers of receiving, rebates through the device of unlawful substitution in respect of certain shipments of lumber at Grand Rapids, Mich.

"The reasonableness of the transit rules here attacked is to be determined largely in the light of the evidence disclosed by the record showing their operation and effect, not only at the points named in this complaint, but elsewhere on defendant's lines. The conditions under which cutting operations are conducted and the exigencies of the transportation conditions in the territory involved are responsible for the transit arrangements, particularly for the assembling and assorting features of it. The record is replete with the arguments advanced by complainants engaged in the assembling and assorting business for the elimination of the rules requiring the surrender of inbound billing covering like kind and equal quantity of lumber shipped out under transit rates. They would limit the requirements as to surrender of inbound billing to the one of weight only, or, as a compromise, to a requirement for outing covering an equal quantity measured by weight and footage. Their arguments are grounded upon the alleged unfairness and impracticability of the rules. We have reviewed the testimony and examined the record with care for any assigned reason or demonstration of their impracticability which does not, in the last analysis, rest upon objections to the barriers which those rules interpose against substitution.

"The rules were adopted for the purpose of enabling defendant to properly police lumber transit arrangements

on its system. They are uniform at all points, and they are applied without discrimination between persons or places. Defendant insists that they are as liberal and simple as is consistent with safety and efficiency. No doubt the kind and quantity rules do minimize the possibilities of unlawful substitution. Complainant's principal witness admits that they do. Complainants also admit that they look at the question solely from their own standpoint. They claim the right to substitute tonnage so long as the through rate is not impaired, and seem to think that the manipulation of expense bills, by which they gain a greater reduction in charges than they would secure if using a legitimate expense bill, does not result in defeat of the lawful rate.

(12) **Reasonableness of the 2-cent Charge.** "While complainants have made the reformation and rescinding of certain of the transit rules their principal issue, they contend also that the 2-cent charge is unreasonable, and excessive, and that it is unduly discriminatory as compared with the 1.5-cent charge at Newport, Johnson City and Bristol, Tenn.

"The evidence introduced by complainants to sustain the allegation of unreasonableness consists chiefly of comparisons of rates and charges at other points and on other roads, unaccompanied by any showing that the circumstances and conditions are substantially similar. Defendant has made a thorough investigation into the nature, extent and incidents of the service at the points involved and the cost thereof, and has presented considerable evidence tending to show that not only is the charge not unreasonable or unduly discriminatory, but that it is in fact not compensatory.

"The first departure from the 2-cent charge formerly uniformly in effect on defendant's lines was at Bristol,

where it appears competition of the Norfolk & Western compelled a reduction in January, 1909, to a flat charge of $2 per car. The same cause soon resulted in the establishment of a like charge at Johnson City. Subsequently the charge was increased at both points to 1 cent per 100 pounds. Complaint alleging discrimination at Newport was made and, upon investigation, sustained, and defendant was ordered to remove the discrimination. Spiegle & Co. vs. S. Ry. Co., 19 I. C. C. 522. To comply with our order, defendant restored the charge at both Johnson City and Bristol to the former basis of 2 cents per 100 pounds.

"A complaint was thereupon filed alleging that the 2-cent charge at Johnson City was unreasonable. Without going at length into the facts and arguments considered by us in those cases, it is sufficient to say that the reasonableness of the 2-cent charge finally turned upon the question of the cost of the service, and was held to be unreasonable to the extent that it exceeded 1.5 cents per 100 pounds. Spiegle vs. S. Ry. Co., 25 I. C. C. 71; Bristol Door & Lumber Co. vs. N. & W. Ry. Co., 25 I. C. C. 87. The present charge of 1.5 cents at Newport, Johnson City and Bristol, which forms the basis of the allegation of discrimination in the instant case, is, therefore, one prescribed by this Commission.

"The cost of service is of controlling importance in considering the reasonableness of this charge. In the Spiegle case, supra, we took into consideration the cost of the service in the following particulars: (1) Switching, including movement of loaded car into the mill and movement of same car out, either loaded or empty, and the occasional movement of an empty car into the mill to receive an outbound load; (2) detention of cars; (3) transfer of cars from through to local trains and vice versa;

(4) additional clerical services necessary; (5) policing of transit arrangements.

"Defendant allowed then, as it now allows, 48 hours, or 2 days, free time for the unloading of the loaded car and an equal period of free time for the loading of an outbound car. The free time, it should be noted, begins to run at 7 o'clock of the next morning after placement of the car. Assuming that the inbound cars were made empty and then loaded out, we found that there was a possible four days' detention of the car above that which a through shipment would involve. The per diem paid by one railroad to another at that time being 35 cents per day, the cost of the four days' detention was computed to be $1.40.

"It was found to be impossible to ascertain the cost of transferring cars from through to local trains and vice versa. Likewise it was found that no definite sum could be assigned to the cost of the extra clerical service and policing, but it was stated that the cost of such service, although not great, was nevertheless substantial and should be considered in determining the cost of the service.

"It was shown in that case that while the prescribed minimum weight was 30,000 pounds, the actual loading was much in excess of that weight. Complainant therein stated that the average loading of his cars was 50,000 pounds. Defendant would not concede an average loading quite as heavy as that, but practically admitted that it would exceed 40,000 pounds. We found that it was probable that the 2-cent charge would yield on the average $9 per car, and that upon a basis of 45,000 pounds average loading a charge of 1.5 cents would yield $6.75 per car. Deducting therefrom an estimated cost of switching of $4, plus car detention of $1.40, left $1.35 to cover cost of extra clerical work, transit supervision, and profit on the

service. Upon that basis we found that a charge of 1.5 cents would be reasonable.

"Defendant has introduced evidence in the instant case to show the average number of switching movements and the average detention of all cars of transit lumber handled at the plants of a number of the principal complainants during the months of April, May and June, 1913. The data submitted are based upon a check of the movement of all cars, made jointly by representatives of complainants, of defendant and of the inspection bureau, and is in the form of a statement compiled and sworn to by the representatives of defendant and of the inspection bureau.

"Except as to a few cars at one plant, full agreement was reached by the parties as to the number and detailed movements of all cars into and out of the respective plants. Complainants except, however, to defendant's method of computing the average number of switch movements per transit car, and almost absolute disagreement exists between the parties as to the deductions that may properly be drawn from the statement in respect to the average of the car detention. Complainants have filed a statement, analyzing the data and submitting for consideration their deductions, as opposed to those of defendant. The joint check covers all cars into and out of the plants of eight of the complainants at Woodfin, Asheville, Biltmore, Azalea and Marion, N. C.

"The number of cars handled and the switching movements performed per transit car are shown by the joint check to be as follows: (a) Total number of cars inbound which were released empty, 381; (b) total number of loaded cars outbound (transit and nontransit) for which empty cars were placed, 137; (c) total number of cars which came in under load and were loaded out (transit and nontransit), 200; (d) total of (a) and (c) gives total

number loaded cars inbound, 581; total number cars placed empty and loaded out with transit lumber, 123; transit cars loaded out which came in under load, 144.

"Taking the outbound transit cars as the unit with reference to which the cost of service should be ascertained, defendant arrives at the average number of switching movements per car as follows: Transit cars arriving under load which were also loaded out, only two switch movements per transit car necessary, 144 cars, 288 switch movements. Transit cars placed empty for loading in lieu of cars arriving under load, the latter not being utilized for outbound loading, making four switch movements per transit car necessary, 123 cars, 492 switch movements. Totals, 267 cars, 780 switch movements. Average switch movements per transit car, 2.92.

"Complainants criticise defendant's statement that 137 cars were moved into the plants, of which 123 were moved in to accommodate outgoing transit shipments, because it does not appear in connection therewith how many of these empty cars it was necessary to furnish on account of inbound cars being foreign-line cars not available for loading out, or, being cars which might otherwise have been loaded out, were not in fit condition for outgoing shipments.

"Secondly, complainants criticise defendant's statement that 381 cars were moved out of the plants empty because it does not show how many of these were, for the reasons already mentioned, not available for reloading. This seems but to state the converse of the just criticism. Only 267 cars of transit lumber were forwarded during the period. Only 137 cars were required to be set in for loading. It follows, obviously, that 244 cars must have been moved out empty because there was, at the time of their release, no outbound loading available for them. In fact, com-

plainants somewhat consistently follow up their reference to the cars moved out empty by an assertion that defendant's statement should have shown that 244 cars were moved out on account of shrinkage or loss in bulk by the milling and drying processes.

"Complainants also comment on the fact that the movement of all cars shown in the exhibit is calculated upon a separate and distinct movement for each car in and for each car out, although two or more cars are often handled together with one switch movement. There must necessarily be switching every time a car is moved into or out of a plant. The charge for such service must be made with respect to some fixed unit, either a weight or a car unit. It is doubtless true that the cost of moving two cars at one time is less than the cost of handling them separately, but it would be wholly impracticable to fix a sliding scale of switching charges based on the number of cars handled in each switch movement. It may be stated that our estimated cost of $2 per car in the Spiegle case was not based upon a single-car movement at any particular point. It contemplated that $2 per car was a fair average charge for the service under all the varying circumstances and conditions obtaining at different points. We believe the method by which the defendant in the instant case arrives at the average switch movements per transit car is fair and as accurate as can be made.

"The parties are, as stated, in disagreement upon the method of computing the average detention. In assessing demurrage against shippers who detain cars, carriers compute the time from 7 o'clock of the morning of the day following the placement of the car until it is released by the shipper. No charge is made, nor is any credit allowed, for fractions of a day. The 48 hours' free time allowed is exclusive of Sundays, holidays and stormy days. The per

diem which one railroad company pays to another is not computed on any such basis, but is a fixed charge per day for all days that a car is on a foreign line. This charge is an item of expense which may properly be taken into consideration in computing the cost of transit service to the carrier. Our estimate of four days' detention in the Spiegle case was based upon the maximum free time that the car could be detained by the shipper under the rule for computing demurrage, but the defendant contends that actual detention should be taken into account in considering the cost of service. The actual detention is not covered by the four days' free time. Defendant, in computing the average detention, has included the day of placing and all time until and including the day the car was pulled out from the plant. On brief counsel for defendant argues:

"'If the extra cost and services involved in affording transit is to be considered, it is certainly unfair to the carrier to disregard the day upon which the car is placed for unloading or loading and compute the detention only from the day following the date of placement. It would certainly be most unfair to the defendant in the instant case to make an allowance of only two days on the inbound and two days on the outbound car, or an allowance upon the combined movement of only four days as the estimated average detention per car, because the actual test made in the instant case covering a period of three months demonstrated that if the detention is computed by using the date of placement of inbound loads of empties and the dates outbound loads and empties are actually pulled out, then, as shown by the revised exhibit, * * * the actual average detention is as follows:

	Number of cars	Total detention days	Average detention per car days
Total inbound cars (released empty)....	381	1,997	5.11
Total outbound cars (placed empty)....	137	497	3.70
Total inbound loads (cars loaded out)...	200	1,719	8.55

"On the inbound movement there is no way of distinguishing transit from nontransit lumber. The 5.11 days' detention of inbound cars released empty includes, as to all cars, the elapsed time from and including the day of placement to and including the day cars were pulled out of plant, although in many instances the cars were released the day before they were pulled out. A total of 123 cars was placed empty for outbound loading with transit lumber during the three-months period. The detention of these cars, based on the elapsed time, averaged 3.69 days. As in the case of inbound cars released empty, the outbound cars were in many instances released the day before they were pulled out. By this method defendant deduces that the total average detention on the combined movement of transit shipments so handled was 8.8 days.

"There were 144 inbound cars reloaded with outbound transit lumber; that is to say, out of a total of 581 cars which came in under load only 144 were reloaded with transit lumber without first having been released and drawn out empty. Upon these 144 cars, using the same method of computation, defendant finds the average detention to have been 8.84 days, or substantially the same as on the combined movement figures shown above.

"Defendant summarizes the general results of its detention calculations as follows:

	Number of cars	Total detention days	Average detention per car days
Total inbound cars (released empty)....	381	1,947	5.11
Total outbound cars (where empty placed for outbound load).....	137	497	3.70
Cars placed empty for outbound transit loading	123	454	3.69
Total inbound loads loaded out.....	200	1,719	8.55
Transit cars loaded in and loaded out...	144	1,273	8.84

"Complainants vigorously protest that defendant's method of computation is misleading and unfair; that by this method defendant charges against cost of transit the greatest possible service that could be performed instead of the actual service; that it is unfair to include the entire day of placement and the entire day upon which the cars are pulled out, unless it be shown that the cars were placed at the beginning of the first day included and pulled out at the close of the last day included. Complainants do not contend that two whole days should be deducted from the detention charged each car shown in the exhibit, but they do contend that the just method would be to take the general average.

"There is no record from which the exact hour at which each car is placed, loaded or empty, can be ascertained, nor says defendant, is it practicable in the ordinary course of business for the railroad to pull cars out immediately upon their release, loaded or empty, by the shipper.

"There is practically no dispute between the parties as to the date of placement. The dates upon which cars were released and pulled out are in many instances not agreed upon by the parties. Defendant's statement explanatory of the exhibit showing the result of the joint check states that accurate release dates could not be obtained at Biltmore, where the plants of three companies are located, or

at Marion, where the plant of another is located. At the four other plants, located at Woodfin, Asheville and Azalea, better records were to be had. At Woodfin and Asheville the release dates and pulled-out dates coincide and are the same, while at Azalea the release date and pulled-out date is ascertained with a fair degree of accuracy.

"Defendant computes the average car detention at the Azalea plants by using the release date contended for by the shipper and compares it with the average detention based upon the pulled out date as shown by its own records. The computation of the detention, made by using the release date as distinguished from the pulled out date, shows at one of the Azalea plants differences ranging from 0.95 to 1.58 days; at another, differences ranging from 0.07 to 0.88 of a day. The average difference at all four of the plants where both the release and pulledout dates were ascertainable is shown to be approximately one-half day. When computed to include the release date only, the average detention of all cars, as shown by defendant's exhibit, is thus reduced one-half day.

"The computation of the average detention should be made upon as fair and equitable a basis as possible. We think the detention time should not include the day of placement where a car is placed so late in the day as to leave the consignee no reasonable opportunity of handling it on that day, nor should the computation include the time after release of the car by the shipper. The difference between the release date and the pulled out date used by defendant has been computed as fairly as possible. To what extent the average detention would be further reduced by excluding time charged against cars which are set too late in the day to be handled is, of course, speculative, but as a test we will exclude the entire day of place-

ment. Excluding thus the date placed and allowing one-half day for the difference between the release and pulled out dates reduces the average detention upon the combined inbound and outbound movement from 8.80 days to 7.30 days, and upon cars loaded in and loaded out from 8.84 days to 7.34 days. Disregarding the fractional days, we see that the average detention of the cars shown in defendant's exhibit was 7 days. This is the most favorable average for complainants that we can compute from the evidence.

"Assuming that the average detention would not exceed seven days, and applying to the calculation of cost at the points here involved the basis used in the Spiegle case, supra, the result, using an average loading of 42,500 pounds, is as follows:

Average lading 42,500 pounds, at 2 cents		$8.50
Average number of switch movements per car 2.92, at $2 per switch movement	$5.84	
Assumed average detention 7 days, at 54 cents per day	3.15	
		$8.99
The items of cost exceed the revenue under 2-cent charge by		.49

"Applying this basis of cost in connection with the revenue produced by a charge of 1.5 cents defendant states:

"If a charge of 1.5 cents were established, then the per car revenue would be only $6.38, leaving a deficit of $2.61 per car, to say nothing of the additional items of cost or the reasonable profit to which the carrier is entitled upon the transaction.

"If we use the same average weight used in the Spiegle case, 45,000 pounds, the costs above shown amount to 1

cent per car less than the revenue at 2 cents per 100 pounds.

"Carrying the calculation to other results obtained by assuming that the actual detention might be less than 7 days, defendant, using the average weight of 42,500 pounds, shows that if the detention were but 6 days the items of cost would exceed the revenue under a 2-cent charge by 4 cents per car, and under a 1.5 cent charge by $2.16 per car, and, further, that if only 4 days' detention were allowed as in the Spiegle case, supra, the revenue would exceed the cost by only 86 cents upon the 2-cent charge, while a 1.5 cent charge would produce a deficit of $1.26.

"During the three months' period covered by the joint check, demurrage charges at the several plants accrued in the aggregate sum of $222. Complainants urge that this amount should be taken into account as an offset against the per diem expenses, but they do not attempt to show by how much defendant's estimate of the per diem expense would be reduced by the offset. Defendant shows that the amount of demurrage spread over the total number of cars inbound and outbound would average only 24 cents per car."

(13) Discrimination. "Complainants allege that the 2-cent charge is unduly discriminatory, and that it seriously affects their ability to do business in competition with transit users at Newport, Johnson City, and Bristol. The 1.5-cent charge at these points was, as has been stated, established by order of this Commission. Whether the discrimination has affected the volume of complainants' business or merely the profitableness of their transactions, whether the discrimination alleged by complainants is measurable wholly and exactly by the difference in the charges, whether their volume of business is greater or

less than that of their competitors at the points mentioned does not appear. Whether or not the discrimination is undue, is to be determined in the light of all the facts surrounding the situations at the respective points. The allegation of discrimination is not supported by evidence other than the mere showing of the difference in charges and general statements as to the effect thereof.

"The investigations of the situations at Newport, Johnson City, and Bristol were made about three years ago. Our decision rendered about two years ago was based upon the facts then presented. The evidence in the instant case is more complete than was that presented in the former cases. In those cases it was limited to conditions obtaining at the points involved, and can not mitigate the effect of evidence upon which a different conclusion necessarily follows with respect to the general situation at the North Carolina points here involved.

"Apropos of the allegation of discrimination, complainants show that they draw lumber from the same producing section and must dispose of their transit shipments in the same northeastern markets with their Tennessee competitors. They ask that their own transit territory be extended to North Carolina towns and southern points. Defendant avers that it has never given transit on lumber destined to that territory; that transit is burdensome and expensive; that generally the rates to the near-by points are less than to the more distant points to which transit is allowed, and that the expense involved in allowing transit to the nearer points would be, in proportion to the total revenue, much greater than it is to the more distant points. It is also averred that commercial conditions do not require transit on lumber destined to southern points. Complainants do not show that defendant's refusal to extend the transit territory into the South subjects them

to undue prejudice or gives any advantage to their competitors. The general policy of the Commission is not to require the establishment of extension of transit except where necessary to remove undue discrimination. The opening up of the southern territory to transit has not been sought by or on behalf of the Tennessee shippers. Standing alone, complainants' request seeks in effect a preference in their own behalf. This the defendant may not lawfully give nor the Commission require."

(14) Conclusions. "We have given consideration to all the matters and things urged by the parties to this proceeding, and upon consideration of all the facts adduced we find that the 2-cent charge is not unreasonable at the points involved and is not shown to be unjustly discriminatory against complainants. The allegations of unreasonableness and discrimination laid against the transit rules are not sustained in general and should be dismissed except in the following particulars:

"1. The rule against issuing credit slips for a particular kind of lumber which, being a part of a mixed carload shipment, weighs less than 1,000 pounds, is unreasonable and possibly is unjustly discriminatory. We hold that no such exception should be continued in the present transit rules.

"2. The practices of defendant in respect to the furnishing of weights on shipments from Azalea, weighed in Marion, are, as they would be elsewhere under like circumstances, unjust and unreasonable. We think there is neither excuse nor justification for the delay in ascertaining and reporting the weights, or for refusing to permit complainants to file additional billing of inbound tonnage which, if the weights could be ascertained at point of shipment, they would then and there be entitled to file.

"3. Upon the subject of the reports and bookkeeping

required by the rules of the inspection bureau, the record is not sufficiently full or clear to enable us to determine to what extent the burden has been increased by the present rules, nor whether unnecessary records or duplication of the work results. Complainants seem to desire not only the abrogation of the 'kind-for-kind' rule, but likewise relief from making any reports showing the receipt and forwarding of different kinds of so-called common lumber. We are convinced, as before stated, that the 'kind-for-kind' rule does minimize unlawful substitution, and in the absence of any suggested efficient substitute therefor we are not prepared to find that the requirements in respect to the reports are unreasonable.

"We adhere to the policy announced in our last report in the Transit Case, and are disposed, in the absence of a showing that the rules attacked are unreasonable or discriminatory, to leave the parties where we find them. If complainants' records satisfactorily show the detailed information and are accessible to the representatives of defendant and the inspection bureau, it may be that some duplication of work results from the requirement for daily reports. If so, the matter is one that can be adjusted between the parties and to which they should address themselves in a fair-minded manner. We shall expect defendant to comply with the requirements indicated in (1) and (2) without the formality of a specific order."

See also—

Spiegle & Co. vs. S. Ry. Co., 34 I. C. C. Rep. 448, 450.
Saginaw Milling Co. vs. M. C. R. R. Co., 33 I. C. C. Rep. 25, 28, 29.
Export Rates on Grain and Grain Products, 31 I. C. C. Rep. 616, 621.
Fabrication-in-Transit Charges, 29 I. C. C. Rep. 70, 76, 88, 89.
Concentration of Cotton at Points in Arkansas, 29 I. C. C. Rep. 106, 107.

Wichita Board of Trade vs. A. & S. Ry. Co., 29 I. C. C. Rep. 376, 378.
Gadow vs. C. St. P. M. & O. Ry. Co., 29 I. C. C. Rep. 457.
Kansas-California Flour Rates, 29 I. C. C. Rep. 459, 460.
Norman Lumber Co. vs. L. & N. R. R. Co., 29 I. C. C. Rep. 565, 572.
Transit Case, 24 I. C. C. Rep. 340, et seq.
Memphis Hay & Grain Assn. vs. St. L. & S. F. R. R. Co., 24 I. C. C. Rep. 609, 610.
Klyce Co. vs. I. C. R. R. Co., 19 I. C. C. Rep. 567, 568, 570, 571.
In re Substitution of Tonnage at Transit Points, 18 I. C. C. Rep. 280, 287.
A. S. Block & Co. vs. L. & N. R. R. Co., 18 I. C. C. Rep. 372.
Bash Fertilizer Co. vs. Wabash R. R. Co., 18 I. C. C. Rep. 522, 523.
Duncan & Co. vs. N. C. & St. L. Ry. Co., 16 I. C. C. Rep. 590, 598, 599.
Quimby vs. Maine Central R. R. Co., 13 I. C. C. Rep. 246, 249.
S. Ry. Co. vs. St. Louis Hay & Grain Co., 214 U. S. 297, 501.
Grand Rapids & Indiana Ry. Co. vs. U. S., 212 Fed. Rep. 577.
Nicholas & Cox Lumber Co. vs. U. S., 212 Fed. Rep. 588.
I. C. C. vs. Goodrich Transit Co., 224 U. S. 194.
Paducah Box & Basket Co. vs. I. C. R. R. Co., Unreported Op. A-74.
I. C. C. Confr. Rulings Bull. No. 6, Rulings Nos. 85, 181 and 203.

Compare—

S. W. Millers' League vs. A. T. & S. F. Ry. Co., 24 I. C. C. Rep. 552.

See also—

Van Dusen Harrington Co. vs. C. M. & St. P. Ry. Co., 35 I. C. C. Rep. 172, 171.
Duncan & Co. vs. N. C. & St. L. Ry. Co., 35 I. C. C. Rep. 477, 480, 483, 484.
Transit Rates on Logs, 34 I. C. C. Rep. 630, 631.
Lumber Transit Rules, 34 I. C. C. Rep. 448, 449.
Gray & Smith vs. Pa. Co., 34 I. C. C. Rep. 25, 27.
Dewey Bros. Co. vs. P. C. C. & St. L. Ry. Co., 35 I. C. C. Rep. 135, 139.
Transit Rates on Logs and Staves at Alexandria, La., 34 I. C. C. Rep. 169, 171.

Indianapolis Chamber of Commerce vs. C. C. C. & St. L. Ry. Co., 34 I. C. C. Rep. 267, 269, 270.
Stock & Sons vs. C. M. & St. P. Ry. Co., 34 I. C. C. Rep. 481, 483.
Western Trunk Line Rules, 34 I. C. C. Rep. 554, 579.
Brenner Lumber Co. vs. M. L. & T. R. R. & S. S. Co., 34 I. C. C. Rep. 630, 631.
Michigan Bean Jobbers Assn. vs. G. R. & I. Ry. Co., 33 I. C. C. Rep. 318, 321.
Anson Gilkey & Hurd Co. vs. S. P. Co., 33 I. C. C. Rep. 332, 336.
Doran & Co. vs. N. C. & St. L. Ry. Co., 33 I. C. C. Rep. 523, 526.
Lumber Transit Privileges at Buffalo, N. Y., 33 I. C. C. Rep. 601, 602.
Transit Regulations on Grain and Dried Beans, 32 I. C. C. Rep. 38, 39.
Stock & Sons vs. L. S. & M. S. Ry. Co., 31 I. C. C. Rep. 150, 151.
Lumber to Nashville, Tenn., 31 I. C. C. Rep. 186, 188.
Wichita Business Assn. vs. C. & O. W. Ry. Co., 31 I. C. C. Rep. 323, 327.
Five Percent Case, 31 I. C. C. Rep. 351, 408.
California-Nevada Lumber Rates, 31 I. C. C. Rep. 464, 465.
Export Rates on Grain and Grain Products, 31 I. C. C. Rep. 616, 621, 622.
Stuarts Draft Milling Co. vs. S. Ry. Co., 31 I. C. C. Rep. 623, 629.
Louisiana Sugar Planters' Assn. vs. I. C. R. R. Co., 31 I. C. C. Rep. 311, 316.
Atlanta Milling Co. vs. L. & W. R. R. Co., 31 I. C. C. Rep. 485, 487.
Rates on Grain and Grain Products, 30 I. C. C. Rep. 16, 17.
Metropolis Commercial Club vs. I. C. R. Co., 30 I. C. C. Rep. 40, 43.
Pacific Coast Gypsum Co. vs. O. W. R. R. & N. Co., 30 I. C. C. Rep. 135.
Anderson-Tully Co. vs. M. La. T. R. R. & S. L. Co., 30 I. C. C. Rep. 140, 145.
Wichita Business Assn. vs. A. T. & S. F. Ry. Co., 30 I. C. C. Rep. 374, 376.
Memark Grain Co. vs. S. P. Co., 30 I. C. C. Rep. 431, 433.
Rates on Cotton and Cotton Linters, 30 I. C. C. Rep. 467, 470.

Memphis Freight Bureau vs. I. C. R. R. Co., 30 I. C. C. Rep. 471, 474.
American Hay Co. vs. C. V. Ry. Co., 30 I. C. C. Rep. 562, 563.
Malt Rates to New Orleans, La., 30 I. C. C. Rep. 587, 591.
Augusta Cotton Exchange and Board of Trade vs. S. Ry. Co., 30 I. C. C. Rep. 704, 705.
Rates on Grain and Grain Products to Texarkana, 29 I. C. C. Rep. 35.
Adams & Sons Co. vs. V. S. & P. Ry. Co., 29 I. C. C. Rep. 52, 53.
In re Freight Bills, 29 I. C. C. Rep. 496, 497.
Concentration of Cotton at Points in Arkansas, 29 I. C. C. Rep. 106.
Wichita Board of Trade vs. A. & S. Ry. Co., 29 I. C. C. Rep. 376, 378.

CHAPTER III.

STORAGE AS A FREIGHT SERVICE.

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CHAPTER III.

STORAGE AS A FREIGHT SERVICE.

§ 1. Storage and Storage Charges.

Storage, when not a part of the detail of delivery of a shipment, is a warehousing service performed by the carrier where the shipper permits his freight to remain in the carrier's possession beyond the free period of unloading or acceptance. It is analogous to demurrage, and when a part of the transportation service, arises out of the duty of the carrier to effect a lawful delivery of the property transported by it.

Storage, as a service, is now included in the provisions of the amended Act to Regulate Commerce to the effect that the term "transportation" shall "include cars and other vehicles * * * and all services in connection with the receipt, * * * storage, and handling of property."

Railroad companies are under obligation to store freight only for such period as may be required to afford the shipper a reasonable opportunity to remove it, and the consignee of freight has no legal right to use the cars of the carriers as warehouses or storage plants.

Sec. 1, Act to Regulate Commerce as amended.
Milwaukee Produce & Fruit Exchange vs. C. & N. W. Ry. Co., 35 I. C. C. Rep. 33, 35.
Lighterage & Storage Regulations at New York, N. Y., 35 I. C. C. Rep. 47, 55, 56.

A railroad freight depot and a public storage warehouse are buildings whose purposes are wholly dissimilar. The former is planned and built to accommodate the current business of the railroad when expeditiously handled, and affords no facilities for storage during long periods of time. The storage warehouse is especially designed for storage purposes. The railway company imposes storage charges, not for gain especially, but in order that it may be enabled to clear its depots, to the end that current business may not be blockaded. That this object may be effected, it is justifiable and necessary to impose a rate higher than that fixed by the public storage warehouse, and if this were not done, there would be no inducement for the removal of goods from the depot to the public warehouse. The business public is as equally much interested as the carrier in having goods removed from cars and depots within a reasonable time after they reach their destination. Another fact which renders storage in a railway depot expensive and hazardous is that owing to the daily movement of traffic into and out of the depot, goods in storage are subject to an additional risk of damage which often results in loss to the railroad as well as to the owner of the goods.

Aside from its purpose in facilitating deliveries of shipments and preventing undue accumulations of freight in the freight depots and storage-houses of the carriers, the storage charge is compensation for the service of storage performed by the carrier. That the carrier has the right to perform free storage service, so long as it does so without undue discrimination or prejudice, is unquestioned, and it may even resort to free storage as an inducement to bring competitive traffic to its rails, and in that respect the carrier may technically discriminate, but such a practice is in that class of discriminations which arise in the practices of carriers and which cannot be considered undue.

The carrier is, nevertheless, entitled to compensation for the storage service, and even though it should receive carload shipments in its freight houses, if the carrier has done so and actually stored and handled such freight, it is entitled to fair compensation for the additional service.

The Commission has held that while carriers may provide, by definite tariff provision free from undue discrimination, for the advancement of storage or transfer charges, the Commission is without authority to compel them to do so. Nor are the charges imposed by commercial warehouses a fair criterion of the reasonableness of a carrier's charge for storage.

Cleveland Salt Co. vs. P. Co., 34 I. C. C. Rep. 638, 639.
Commercial Club of Duluth vs. B. & O. R. R. Co., 27 I. C. C. Rep. 639, 658.
New England Investigation, 27 I. C. C. Rep. 560, 561.
In re Demurrage Charges, 25 I. C. C. Rep. 314, 324.
Western Classn. Case, 25 I. C. C. Rep. 442, 445, 488.
Blackman vs. So. Ry. Co., 10 I. C. C. Rep. 352.

See also—

Plymouth Coal Co. vs. L. V. R. R. Co., 36 I. C. C. Rep. 140, 142.

§ 2. Storage Regulations and Charges Must Be Published.

Section 6 of the Act to Regulate Commerce as amended provides that the tariffs and schedules of the carriers required to be printed, filed, and posted, shall also state separately the terminal charges and any rules or regulations which in any wise affect or determine any part of the aggregate of the rates, fares, and charges contained in such tariffs or schedules.

The Commission's tariff regulations require "that each carrier shall publish, with proper I. C. C. numbers, post, and file separate tariffs which shall contain in clear, plain,

and specific form and terms all the terminal charges and all allowances, such as arbitraries, switching, icing, storage, * * * together with all other privileges, charges, and rules, which in any way increase or decrease the amount to be paid on any shipment as stated in the tariff which contains the rate applicable to such shipment, or which increase or decrease the value of the service to the shipper."

The inclusion of storage as a part of the transportation service for which a rate is named by the carrier is of value to the shipper of staple commodities, and the requirement as to publication is imperative in its furtherance of the purpose of section 6 of the Act to secure to the public an opportunity of knowing the rates charged for the services rendered. Whenever any service is rendered or any privilege allowed beyond the ordinary receiving, transporting, and delivery of property, they should appear upon the schedule.

Am. Warehousemen's Assn. vs. I. C. R. R. Co., 7 I. C. C. R. 556.

The privilege of storage does change, affect, or determine the aggregate charge to the shipper and to the extent of the cost for the carrier as well.

Am. Warehousemen's Assn. vs. I. C. R. Co., 7 I. C. C. R. 556.
Sec. 6, Act to Regulate Commerce as amended.
I. C. C. Tariff Circular 18-A, Rule 10-(a).

See also—

Storage Charges in C. F. A. Territory, 28 I. C. C. Rep. 372, 375.
Du Mee Son & Co. vs. P. & R. Ry. Co., 26 I. C. C. Rep. 33, 34.

§ 3. Discriminations May Not Be Made in Granting of Storage Privileges and Facilities.

The service of storage of freight, when performed by the carriers, must be free from unjust discrimination and the charges therefor must be reasonable. Sections 2 and 3 of the Act to Regulate Commerce, as amended, each forbids the allowance or non-allowance of storage privileges and facilities in a manner to create unjust discrimination or undue preference.

Wight vs. U. S., 167 U. S. 512.
Secs. 2 and 3, Act to Regulate Commerce as amended.
Lighterage and Storage Regulations at New York, N. Y., 35 I. C. C. Rep. 47, 56, 57, 58, 59.
Rates for Transportation of Anthracite Coal, 35 I. C. C. Rep. 220, 232.
Mobile Chamber of Commerce vs. M. & O. R. R. Co., 32 I. C. C. Rep. 272.
Regulations as to Storage of Dairy Products, 35 I. C. C. Rep. 469, 470.
Cleveland Salt Co. vs. P. Co., 34 I. C. C. Rep. 638, 639.
Eastern Fruit Growers' Assn. vs. B. & O. R. R. Co., 33 I. C. C. Rep. 343, 345.
Mobile Chamber of Commerce vs. M. & O. R. R. Co., 32 I. C. C. Rep. 272.
Corp. Com. of Okla. vs. K. C. M. & O. Ry. Co., 32 I. C. C. Rep. 384, 386.
Wichita Business Assn. vs. A. T. & S. F. Ry. Co., 30 I. C. C. Rep. 374, 376.
Parry & Co. vs. P. R. R. Co., 29 I. C. C. Rep. 559, 561.
American Hay Co. vs. C. V. Ry. Co., 29 I. C. C. Rep. 659, 660.
New Orleans Storage Rules and Regulations, 28 I. C. C. Rep. 605.
Reconsignment and Storage of Lumber and Shingles, 27 I. C. C. Rep. 451, 456.
Commercial Club of Duluth vs. B. & O. R. R. Co., 27 I. C. C. Rep. 639, 658.
New England Investigation, 27 I. C. C. Rep. 560.
In re Demurrage Charges, 25 I. C. C. Rep. 314, 324.
Western Classn. Case, 25 I. C. C. Rep. 442, 488.
Brey vs. P. R. R. Co., 16 I. C. C. Rep. 497, 500, 501.

§ 4. Distribution of Part-Lots of Storage Freight.

The functions of a carrier are to receive, transport, and deliver. As a rule, it can only be forced into the position of warehousemen through lack of diligence on the part of the consignee in the removal of his property. With no general duty to act as a warehouseman for indefinite periods in connection with its primary obligations as a common carrier, it cannot assume to provide shippers with valuable warehouse facilities which are not essential to its business as a carrier, without furnishing them for all shippers at all times and upon the same terms and notifying the public thereof in the manner provided by law.

Distributing consignments in part lots to different subsequently designated persons and reshipping upon shipper's order parts of consignments held in store, and kindred concessions, come within the same requirements of impartiality and publication.

The storage of freight and part-lot distribution are of considerable importance and value to shippers, and especially so to the class of manufacturers or dealers largely engaged in supplying those staple commodities which are in common demand throughout the country. To the extent of its value, each privilege lessens the aggregate compensation paid by shippers to carriers for transportation and terminal services.

Am. Warehousemen's Assn. vs. I. C. R. Co., 7 I. C. C. R. 556.

§ 5. Grain in Elevator Beyond Elevation Period Becomes "in Storage."

The "treatment," or grading, cleaning, and clipping, of grain, is not properly a part of "elevation" as the word is strictly used, and the retention of grain in an elevator

beyond the period of ten days becomes storage and is not elevation.

Re Allowance to Elevators by Un. P. R. R. Co., 12 I. C. C. R. 85.

§ 6. Reconsignment of Part-Lots of Storage Freight.

See "Reconsignment of Part-Lots," under "Special Freight Services," Part II, Chap. VIII, Sect. 9.

§ 7. Elevator-Elevation Service—Distinguished from Storage.

See Chap. XI, this volume, Sect. 1, "Allowances for Elevation."

§ 8. Free Storage Creating Distribution Point for Private Industry.

Its attention being called to a tariff which, in effect, created a distributing point for a special industry by granting free storage at that point, either in its own or the carrier's warehouses, and practically without limit as to time, the merchandise when shipped out to go on balance of through rate, the Commission expressed its disapproval.

I. C. C. Conf. Rulings Bull. No. 6, Ruling No. 5.

§ 9. Cancellation of Storage Charges Amounts to a Rebate Under Certain Conditions.

Where a carrier holds shipments of petroleum in storage until substantial claim accrued, then cancels such storage charges, it was held to amount to a rebate, in violation of the Act to Regulate Commerce.

U. S. vs. Standard Oil Co., 148 Fed. Rep. 719.

But where, because of inclement weather and impassable roads, the shipper failed to remove less-than-carload

freight within the free time specified in the tariffs, and storage charges accrued, the Commission approved the application of the same rule to storage charges as governs demurrage charges under such conditions, provided such rule is incorporated in the tariff.

I. C. C. Confr. Rulings Bull. No. 6, Rulings Nos. 242, 313 and 404.

The Commission has also held that a terminal company may not lawfully cancel storage charges that have accrued under published rates, on shipments landed and stored on its wharf with its consent, pending the repair of a warehouse which it had leased to the shipper and which had been destroyed during a storm.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 403.

§ 10. Storage Charges Accrue Only After Goods Legally Tendered.

Storage charges may not lawfully begin to accrue until freight has been tendered under such circumstances that consignee is legally obliged to receive the same. If marks on shipment have been so obliterated through negligence of defendant that property can not be identified, complainant is under no legal obligation to take what might or what might not be its property.

Kilburn Mills vs. N. Y. N. H. & H. R. R. Co., 22 I. C. C. R. 21, 22.

See also—

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 366.

§ 11. Limitation in Tariff as to Storage.

A tariff is not objectionable that limits the application of an import rate to traffic stored in a bonded warehouse

or delivered to the carrier from the ship. But a tariff limiting the application of an import rate to traffic stored in a bonded warehouse or delivered to the carrier from the ship, is discriminatory, where the carrier offered storage in its bonded warehouse only when room is available.

Swift & Co. vs. B. & O. R. R. Co., 21 I. C. C. Rep. 241, 242.

§ 12. Free Storage of Salt at Chicago.

The storage of salt at Chicago is a privilege attached to the lake rate and is undoubtedly an advantage to the lake shipper. In fact, it is of sufficient value, together with the rate itself, to actually divert a very substantial part of the through tonnage to that route.

Internl. Salt Co. vs. G. & W. R. Co., 20 I. C. C. R. 530, 535.

§ 13. Sale of Stored Freight Not Waiver of Carrier's Charges.

Under a tariff containing the following rule, "When freight can not be disposed of at point held for sufficient amount to realize by sale both freight and car service, or storage charges, demurrage charges may be refunded, waived, or canceled," the Commission held that the performance of a transportation service determines the obligation of the carrier to collect and of the shipper to pay the published rates therefor and no subsequent fact, having no relation to the service, can lawfully be made the basis for a refund or other departure from such rates. The provision is therefore unlawful per se and can not be accepted as authority for a waiver, refund, or cancellation of the tariff charges, even as to a shipment made while the provision was contained in the published tariff."

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 145. See note to Ruling No. 242 and compare Ruling No. 41.

§ 14. Liability of Carrier Failing to Forward Notice of Arrival to Consignee.

It is held that when the definite address of a consignee is noted upon the bill of lading it is the duty of the initial and of each succeeding carrier to transmit that address to connections participating in the movement, and the duty of the delivering carrier to send notice of arrival to that address. The carrier at fault in this respect will be held liable for demurrage or storage charges accruing as the result of the failure of the notice to reach the consignee.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 366.

See also—

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 127.

§ 15. Liability of Carrier for Storage Charges Accruing on Account of Misrouting by Carrier.

In a case where the address of the consignee having been omitted, a shipment, arriving at destination by a line other than that designated in the routing instructions, was sent to a storage warehouse. The consignee had made inquiry for it of the delivering carrier noted on the bill of lading. The freight rates were the same by either route. The Commission held, that the initial carrier is liable for the storage and drayage charges resulting from misrouting the shipment.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 383.

CHAPTER IV.

REFRIGERATION, VENTILATION AND PRE-COOLING.

§ 1. General Nature of Refrigeration and Ventilation Services.
§ 2. Carriers May Procure Refrigeration Facilities From Outside Sources.
§ 3. Carriers Responsible for All Refrigeration and Ventilation Facilities and Services Furnished the Shipper.
§ 4. Refrigeration, Ventilation Furnishing at Destination Point Pending Delivery.
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CHAPTER IV.

REFRIGERATION, VENTILATION AND PRE-COOLING.

§ 1. General Nature of Refrigeration and Ventilation Services.

Prior to the 1906 amendment of the Act to Regulate Commerce, the duty of carriers engaging in the transportation of property of such a perishable nature as to require refrigeration or ventilation, to furnish refrigerator or ventilator cars for such property, existed at common law and was enforcible only by the courts.

Re Refrigeration of Fruits on P M. R. Co., 10 I. C. C. R. 360.

The Supreme Court of the United States held that this duty extended to all common carriers, including ships of the sea.

Martin vs. The Southwark, 191 U. S. 1, holding the ship owner, in transporting fresh meat, under obligation to furnish refrigeration and facilities therefor.

By the amendment of 1906 the first section of the Act was made to include in the term "transportation" cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership, * * * and all services in connection with * * * ventilation, refrigeration, or icing, and it was made the duty of the

carriers subject to the Act to furnish such "transportation" upon reasonable request therefor, and "to establish through routes and just and reasonable rates applicable thereto."

Act to Reg. Com., sec. 1.

By the amendment of 1910, the following clause was added:

"And to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto."

Act to Reg. Com., sec. 1, par. 1.

The above amendments to the Act simply enacted into statutory law the common law duty of the carrier. The Commission early held that it was the duty of the carriers at common law to furnish suitable facilities for the conduct of the business in which they engaged and they are liable for failure to do so, and where they hold themselves out as carriers of perishable traffic, they must provide the necessary refrigerator cars for the transportation of that traffic.

Re Charges for Transportation, etc., 11 I. C. C. R. 129.

Where a railroad company holds itself out as the carrier of a commodity which can only move under refrigeration, its duty extends ordinarily to furnishing that refrigeration, for the icing is not a mere incident of the transportation service, but is a part of the service itself, and properly speaking, it is not ice but refrigeration that the carrier fur-

nishes to accompany the shipment during the entire movement of its journey. Where the railroad company insists that the ice shall be supplied only by the party whom it appoints, and where it collects from the shipper and passes over to this party the compensation for that service, the railroad company must stand responsible for the refrigeration, the same as for any other part of the transportation service. Refrigeration, being incumbent upon the carrier as part of the transportation, the charge for that service stands like any other charge for transportation. It is the duty of the carrier to publish, file with the Commission, and observe its refrigeration charges, and the Commission has the same jurisdiction to inquire into the justness and reasonableness of such charges as it has of any other charges for the transportation of persons or property.

Re Charges for Transportation, etc., 11 I. C. C. R. 129.
Truck-Farmers' Assn. vs. N. E. R. R. Co., 6 I. C. C. R. 295.

Since the 1906 amendment, the common carriers subject to the Act may not lawfully refuse "transportation" as therein defined, but they must upon reasonable request, afford the same upon established rates filed and kept posted as required by law. The jurisdiction of the Commission and the purposes of the law cannot be defeated by the omission or failure of carriers to include in their schedules and to keep posted and open to public inspection the rates, fares, and charges for the entire service, both transportation proper and refrigeration, which under the law they are bound to provide.

Waxelbaum vs. A. C. L. R. Co., 12 I. C. C. R. 178. (1907.)
Standard Lime & Stone Co. vs. C. V. R. Co. et al., 15 I. C. C. R. 620, affmg. 12 I. C. C. R. 178.

§ 2. Carriers May Procure Refrigeration Facilities from Outside Sources.

The same principle expressed with respect to carriers obtaining elevation facilities from outside owners applies to refrigeration facilities and equipment. A carrier may lawfully enter into an exclusive contract with a car-line company, like the Armour Car Lines, to furnish refrigeration facilities for transportation over its road; both refrigeration cars and ice to be used therein.

Re Transportation and Refrigeration of Fruit, etc., 10 I. C. C. R. 360.

The Act as amended requires the carrier to furnish refrigeration and ventilation as part of the service of "transportation" and whatever transportation service or facility the law requires a carrier to supply, it has a right to furnish.

Sec. 1, Act to Regulate Commerce as amended.
Atchison Ry. Co. vs. U. S., 232 U. S. 199.
Arlington Heights Fruit Exchange vs. S. P. Co., 20 I. C. C. Rep. 106, 116.

See also—

Penna. Paraffine Works vs. Pennsylvania R. R. Co., 34 I. C. C. Rep. 179.

§ 3. Carriers Responsible for All Refrigeration and Ventilation Facilities and Services Furnished the Shipper.

A car equipped for refrigeration or ventilation while engaged in the transportation of property requiring refrigeration or ventilation is, to all intents and purposes, the car of the railroad performing the transportation service, irre-

spective of its ownership or of any contract express or implied, for the use thereof.

The duty to furnish the refrigeration facilities is imposed upon the carrier, and it is immaterial in the law whether the carrier owns or leases such equipment, and the carrier's responsibility for the efficiency of the facility furnished is the same with respect to leased equipment as with its own equipment.

Re Charges for the Transportation and Refrigeration of Fruit, 11 I. C. C. R. 129.
Act to Reg. Com., sec. 1.

The duty with respect to the furnishing of refrigeration facilities imposed by the amended Act is correlative, and in the same degree that the responsibility rests upon the carrier for the efficiency of the car furnished it is imposed upon the railroad for the sufficiency of the refrigeration service. The language of the Act now includes "all services in connection with the * * * ventilation, refrigeration, or icing * * * of property transported," and imposes the duty upon the carrier of providing and furnishing "such transportation upon reasonable request therefor." And even though the carrier procure the icing of its refrigerator cars by an outside party, collects a charge therefor from the shipper or owner and turns it over to such party as compensation for such service, such carrier must stand responsible for such refrigeration service the same as for any other part of the transportation service.

Act to Reg. Com., sec. 1, par. 1.
Re Charges for the Transportation and Refrigeration of Fruit, etc., 11 I. C. C. R. 129.

See also—

Arlington Heights Fruit Exchange vs. S. P. Co., 20 I. C. C. Rep. 106, 109.

§ 4. Refrigeration, Ventilation Furnishing at Destination Point Pending Delivery.

The duty to provide proper refrigeration or ventilation of property in transportation continues during the period allowed for unloading. If a car is ordered "held" by the shipper or owner at destination pending market or other conditions, or if the consignee fails to unload within a proper unloading period, the carrier is not justified in failing to exercise reasonable care for the preservation and protection of the property, and if icing is necessary to such preservation and protection of the goods, even its restricted responsibility as warehouseman would require the carrier to ice the car, as he would be held responsible in law for the damage or loss which he could have prevented by the exercise of reasonable and due care.

§ 5. Investigations by Interstate Commerce Commission Into Refrigeration Practices and Charges.

The Interstate Commerce Commission has conducted numerous investigations into the propriety of refrigeration and ventilation practices and charges.

The prevailing principle followed by the Commission in these cases has been that the carriers' duty is to furnish refrigeration or ventilation "upon reasonable request"; that it shall be paid a reasonable compensation for such service, and that there shall be a sufficient volume of traffic offered to justify the furnishing of the service.

The Commission distinguishes between refrigeration, ventilation, pre-icing and pre-cooling, and other preservation services. It holds refrigeration to be part of the transportation service, but that pre-icing and pre-cooling are not; nor may the shipper who ships under ventilation be required to help pay the transportation charge of the shipper who requires refrigeration.

Wattam vs. N. P. Ry. Co., 37 I. C. C. Rep. 101, 102.
Smith vs. C. & O. Ry. Co., 37 I. C. C. Rep. 604, 606.
Rates and Rules on Shipments of Packing-House Products, 36 I. C. C. Rep. 62, 63, 69.
New Orleans Shippers Assn. vs. I. C. R. R. Co., 34 I. C. C. Rep. 32, 34.
West Bound Transcontinental Refrigeration Charges, 34 I. C. C. Rep. 140, 144.
Montrose & Delta Counties Freight Rate Assn. vs. D. & R. G. R. R. Co., 34 I. C. C. Rep. 400, 406, 407, 408.
Hume vs. S. P. Co., 33 I. C. C. Rep. 126, 127.
Rates on Tomatoes from Jacksonville to Kansas City, 33 I. C. C. Rep. 145, 148.
Providence Fruit & Produce Exchange vs. N. Y. C. & H. R. R. R. Co., 33 I. C. C. Rep. 294, 296.
Eastern Fruit Growers' Assn. vs. B. & O. R. R. Co., 33 I. C. C. Rep. 343, 350.
Lindsay & Co. vs. Northern Ex. Co., 33 I. C. C. Rep. 394, 399.
Kenner Truck Farmers' Assn. vs. I. C. R. R. Co., 32 I. C. C. Rep. 1, 7, 10.
R. R. Com. of California vs. A. G. S. R. R. Co., 32 I. C. C. Rep. 17, 20, 23.
Pacific Fruit Exchange vs. S. P. Co., 32 I. C. C. Rep. 48, 49.
California Fruit Growers' Assn. vs. A. G. S. Ry. Co., 32 I. C. C. Rep. 51, 52.
Lindsay & Co. vs. N. P. Ry. Co., 32 I. C. C. Rep. 287, 288.
Rules Governing Shipments of Freight in Peddler Cars, 32 I. C. C. Rep. 428, 429.
Pacific Fruit Exchange vs. S. P. Co., 31 I. C. C. Rep. 159, 164, 165.
Refrigeration Rates from New Orleans, 31 I. C. C. Rep. 637, 638.
Minimum Weight on Fresh Meats and Other Commodities, 30 I. C. C. Rep. 349, 351.
Rates on Bananas from Gulf Ports, 30 I. C. C. Rep. 510, 516.
Lake-and-Rail Butter and Egg Rates, 29 I. C. C. Rep. 45, 48, 51.
Protection of Potato Shipments in Winter, 29 I. C. C. Rep. 504.
Rates on Tomatoes from Jacksonville, 29 I. C. C. Rep. 522, 523.
Refrigeration Charges on Fruit and Vegetables, 29 I. C. C. Rep. 653, 657.
Refrigeration Fruits, etc., 28 I. C. C. Rep. 326, 328.

Western Fruit Jobbers' Assn. vs. C. R. I. & P. Ry. Co., 27 I. C. C. Rep. 417, 423.

Refrigeration Charge on K. C. S. Ry., 26 I. C. C. Rep. 617, 620.

Protection of Potato Shipments in Winter, 26 I. C. C. Rep. 681, 684.

C. G. Justice Co. vs. P. R. R. Co., 26 I. C. C. Rep. 478, 479.

Mason Bros. vs. S. P. Co., 25 I. C. C. Rep. 35, 36.

In re Advances on Potatoes, 25 I. C. C. Rep. 159, 163.

In re Advances in Demurrage Charges, 25 I. C. C. Rep. 417, 423.

Western Classn. Case, 25 I. C. C. Rep. 442, 498.

Crutchfield and Woolfolk vs. S. P. Co., 24 I. C. C. Rep. 651, 653.

Advances on Fruits and Vegetables, 24 I. C. C. Rep. 164.

Jackson and Perkins Co. vs. S. P. Co., 24 I. C. C. Rep. 323.

In re Pre-Cooling and Pre-Icing, 23 I. C. C. Rep. 267, 269.

In re Advances on Meats and P. H. Prods, 23 I. C. C. Rep. 656, 671.

Arlington Heights Fruit Exchange vs. S. P. Co., 22 I. C. C. Rep. 149, 153.

Albree vs. B. & M. R. R. Co., 22 I. C. C. Rep. 303, 322.

Arlington Heights Fruit Exchange vs. S. P. Co., 20 I. C. C. Rep. 106, 109.

Georgia Fruit Exchange vs. S. Ry. Co., 20 I. C. C. Rep. 623.

Intern'l Salt Co. vs. P. R. R. Co., 20 I. C. C. Rep. 539, 541.

Sweeney, Lynes & Co. vs. N. Y. P. & N. R. R. Co., 20 I. C. C. Rep. 600.

Arlington Heights Fruit Exchange vs. S. P. Co., 19 I. C. C. Rep. 148, 154.

Davies vs. I. C. R. R. Co., 19 I. C. C. Rep. 3.

Ponchatoula Farmers' Assn. vs. I. C. R. R. Co., 19 I. C. C. Rep. 513.

Olympia Brewing Co. vs. N. P. Ry. Co., 17 I. C. C. Rep. 178, 181.

California Fruit Exchange vs. Santa Fe Refrigerator Despatch Co., 17 I. C. C. Rep. 404.

Asparagus Growers' Assn. vs. A. C. L. R. R. Co., 17 I. C. C. Rep. 423, 427, 429.

Memphis Frt. Bu. vs. K. C. S. Ry. Co., 17 I. C. C. Rep. 90.

Ozark Fruit Growers' Assn. vs. St. L. & S. F. R. R. Co., 16 I. C. C. Rep. 106, 115.

(See also same case in 16 I. C. C. Rep. 153.)

Fla. Frt. & Veg. Prot. Assn. vs. A. C. L. R. Co., 14 I. C. C. Rep. 476.
Fain & Stamps vs. A. C. L. R. R. Co., 13 I. C. C. Rep. 529, 530.
Bannon vs. So. Ex. Co., 13 I. C. C. Rep. 516, 520.
Am. Frt. Un. vs. C. N. O. & T. P. R. Co., 12 I C. C. R. 411.
Waxelbaum & Co. vs. A. C. L. R. R. Co., 12 I. C. C. R. 178.
Consld. For. Co. vs. So. P. R. Co., 10 I. C. C. R. 590.
Ga. Peach Growers Assn. vs. A. C. L. R. Co., 10 I. C. C. R. 255.
Re Refrigeration of Fruits on P. M. R. Co., 10 I. C. C. R. 360.
Truck-Farmers' Assn. vs. N. E. R. Co., 6 I. C. C. Rep. 295.

§ 6. Refrigeration of Citrus Fruits.

(1) Standard Refrigeration. Fruits of this character, like oranges, etc., are loaded into a refrigerator car before either the fruit or the car has been artificially cooled, the boxes being so packed as to allow a free circulation of air between and around them. When shipments originate in Southern California, after being loaded, the car is taken to some assembling point, usually San Bernardino, on the line of the Santa Fe, and Colton, on the line of the Southern Pacific, and the bunkers are there filled with ice. As the car moves east the bunkers are opened from time to time and replenished with ice. This process of refrigeration has long been in use on citrus and other fruits from California, is now generally in use, and known as "standard refrigeration."

(2) Pre-Cooling. "Pre-cooling" is a system of refrigeration which consists of pre-icing a refrigerator car, i. e., icing the car before loading, or cooling the fruit before loading and loading into a pre-iced car. This system of refrigeration is essentially different from standard refrigeration, and grew out of experiments conducted by the United States Department of Agriculture, under direction of Professor Powell, in the handling of oranges. Professor Powell's researches demonstrated that decay in oranges was due mainly to mechanical injury in their handling and

that if this could be avoided refrigeration was not necessary to prevent decay, but only to preserve the appearance of the fruit. While the greatest care is now exercised in the handling of the orange from the tree to the car, abrasions of the skin can not be entirely avoided, and the experiments above referred to further demonstrated that in case of such injury the result was minimized by cooling the fruit at the earliest possible moment and maintaining it thereafter in a low temperature. It is more difficult to arrest and control the process of decay when it has once fairly set in than it is to check it at its inception.

There are two methods of pre-cooling—one by the shipper and one by the carrier, each of which is essentially different.

In pre-cooling by the shipper the basic idea is to bring the fruit under the influence of a low temperature at the earliest possible moment. The oranges are brought from the tree to the packing house and packed in a box which is immediately deposited in a cold room. Here the process of extracting the heat from the orange at once begins and gradually continues until at the end of from twenty-four to forty-eight hours all parts of the fruit in all parts of the box have been reduced to a uniform temperature of from 33 to 35 degrees Fahrenheit. The box remains in the cold room at this temperature until it is to be loaded. The car is then connected with the room by a collapsible passageway and the oranges are taken directly from the cold storage to the car, where they are placed, not with air spaces between as in the case of standard refrigeration or ventilation, but closely packed together. The bunkers of the car are filled with large blocks of ice especially adapted for that purpose, and the bunkers and vents are sealed up so as to make the car as nearly air-tight as possible. All this is done by the packer at the packing house,

and the car is then delivered to the carrier with instructions to transport to destination without re-icing and without breaking the seals.

The method of pre-cooling used by the carriers is essentially different from the process employed by the packer. No attempt is made to cool the fruit until after it has been placed in the car; but the cars themselves, loaded exactly as they would be for transportation under ventilation or under standard refrigeration, are taken to the pre-cooling station.

The pre-cooling is accomplished by forcing a blast of cold air through the car which contains the fruit. At the beginning of the process the air entering the car is considerably below freezing, but as the fruit becomes cooler the temperature of the air current is raised.

In commenting upon these two methods of pre-cooling, the Commission said:

"The growers of California do not desire to refrigerate their shipments of oranges; they prefer that this should be done by the carriers, but they do insist that the carriers shall not charge for that service more than it can be performed for by the methods which they have devised. In this we sustain them. If the carrier does not see fit to furnish standard refrigeration at less than the present rate, and if it can not furnish pre-cooling of the kind supplied by the shipper, then we think the shipper should be allowed to pre-cool and pre-ice for himself. No reason is obvious why there should be laid upon his traffic an annual burden substantially sufficient in amount to reproduce each year the facilities which these defendants say would be destroyed if permission to pre-cool is granted."

In the Arlington Heights Fruit Exchange Case, supra, the Commission reduced the charge made by the carriers for pre-cooling from $30 to $7.50 per car. Proceedings

were begun by the carriers in the Commerce Court to enjoin the enforcement of this order, but that court declined to interfere, holding that inasmuch as the order simply required the reduction of a rate voluntarily established by the carriers, nothing but the amount of the charge was before the court and that the right of shippers to insist upon the privilege of pre-cooling could not be adjudicated in such proceeding.

Thereupon the carriers filed tariffs establishing the rate of $7.50, as ordered by the Commission, but immediately thereafter they filed other tariffs cancelling these tariffs and withdrawing the privilege of pre-cooling altogether. Upon protest from interested shippers the Commission suspended the tariffs cancelling the pre-cooling privilege by its order in this proceeding, so that the question for consideration was, did the carriers have the right to cancel their pre-cooling tariffs and thereby withdraw that privilege entirely?

All the facts bearing upon this subject were presented to the Commission upon the hearing in the former case and were fully stated in the report of the Commission. All parties waived the right to introduce further testimony and asked that the matter be disposed of upon the former record.

In again reviewing this phase of refrigeration, the Commission said:

"To what extent the refusal of the defendants to furnish cars for pre-cooling under tariffs which have been regularly established amounts to a violation of the Act to Regulate Commerce, or whether this Commission can deal with such refusal either by an express order requiring the furnishing of cars or by the giving of damages for such failure, are questions which have not been presented in argument and which are not at this time considered.

"Neither have we been asked to consider whether the cancellation of these tariffs and the withdrawal of the privilege is such a change in rates as justifies us in suspending the tariffs of cancellation and requiring the maintenance of the rate. Apparently no such question could be successfully raised. If shippers are entitled to pre-cool upon a reasonable charge, then it must follow that this Commission has authority to determine that reasonable charge and require carriers to file tariffs establishing it. The withdrawal of such tariffs when already filed is clearly a change in the rate to the disadvantage of the shipper which this Commission may properly suspend. If the shipper is entitled to this rate, then the Commission upon determining the fact should order the rate to be filed and maintained. How far the carrier may go in declining to furnish equipment, or what the remedy of the shipper may be in case of such refusal, is a different question.

"The defendants in their briefs assume that the only subject for consideration now is the single inquiry, Have shippers the legal right upon proper terms to pre-ice their shipments, as that term is defined in the former opinion? If shippers have that right, then it is apparently conceded that the Commission may by its order require the maintenance of tariffs according it in due form.

"In its original opinion, at page 115, the Commission said:

" 'When pre-cooling was first tried no additional charge was made by the carriers. After the pre-cooling plants at East Highlands and Pomona had been erected a charge of $30 per car was established; that is, if the shipper pre-cooled and pre-iced his car and the carrier then transported that car to its destination without icing in transit the shipper was required to pay $30 per car, which the complainants contend is unreasonable. The defendants now

state that this charge was established for experimental purposes; that they deny the legal right of the shipper to pre-cool and pre-ice his fruit and are satisfied that that privilege ought not to be accorded upon any terms. While they have allowed their tariffs to remain in effect pending this proceeding, they express the intention upon its determination of withdrawing the privilege entirely. Two questions are therefore presented for our determination.

" '1. Has the shipper the legal right to pre-cool and pre-ice his shipments in the manner indicated?

" '2. What, if any, charge may the carrier reasonably make when the car is so treated?'

"It will be seen, therefore, that the exact question which we are called to pass upon now was presented in the former case. No new facts are before us. Additional briefs have been filed by both parties, but the arguments now introduced on both sides were urged in the former case and were fully considered by us. We find no reason for reaching a different conclusion now from that formerly announced.

"It does not seem profitable at this time to restate in any detail either the facts or the reasons actuating the Commission, since those are fully given in the former opinion, but for the purpose of presenting distinctly the issue involved the claims of the parties and the position of the Commission may be briefly recapitulated.

"The carriers insist that pre-cooling, as practiced by these shippers, is essentially a refrigeration service; that this service is by statute made a part of the transportation which they are required to furnish, and that therefore they may and must supply it, and may insist upon their right to do so without interference by the shipper.

"This Commission expressed the opinion before the enactment of the statute in its present form that the fur-

nishing of necessary refrigeration for the transportation of fruits and vegetables was a transportation duty devolving upon the carriers, and that while this service was sometimes in part performed by the shipper it should be treated as a part of the transportation for which the carrier should be held responsible. The present statute making refrigeration a part of transportation was enacted at the suggestion of this body. If, therefore, pre-cooling as practiced is refrigeration, as previously defined by this Commission, then we are committed irrevocably to the proposition that it is a part of the transportation service and that carriers may and should ordinarily perform that service without recourse to the shipper; certainly they may insist upon performing the service exclusively. If the rate charged is unreasonable then that charge, like any other for a transportation service, may be reduced upon application to this body.

"We are, however, of the opinion that the thing done in this case is not refrigeration as ordinarily understood and as previously considered by us, and not a part of the transportation service which these carriers render. The reason for this conclusion is found in the character of the service itself.

"Under ordinary refrigeration oranges are placed in the car with spaces between the tiers so as to admit of the free circulation of air. The ice bunkers in the ends of the car are filled with ice, sometimes before the car is loaded but usually not until after the fruit has been put in position, and the ice bunkers are opened and replenished from time to time as the car proceeds on its journey. It is the duty of the carriers to see that the bunkers are properly provided with ice and that the vents of the car are properly closed or opened.

"Pre-cooling as practiced by these shippers is entirely

different from the refrigeration above described. Under this method the fruit is brought from the orchard to the packing house and is at once packed and placed in a cold room where the heat is gradually extracted. Shippers insist that the essential feature of pre-cooling or pre-icing as practiced by them is that the fruit be at once placed under refrigeration, that the heat be gradually and thoroughly extracted from the fruit without subjecting it at any time to an abnormally low temperature, and that when cooled it should be kept at that temperature until loaded. When the car is to be loaded it is brought to the packing house, connected with the cooling room, and thoroughly cooled itself. The oranges are now packed into the car, not with spaces between the boxes but in a solid mass, which incidentally permits of increasing the load of fruit from five tiers to six. The bunkers are filled with ice, large cakes especially prepared for the purpose being used and great care being taken to see that the bunkers are thoroughly filled. After all this has been done the car is sealed up and hauled through to its destination without opening the bunkers and without unsealing the car.

"In our opinion there is nothing connected with this operation which is or properly could be a part of the transportation service. Certainly that can not be a transportation service which the carrier in the nature of things can not perform, and there is no essential element in the successful use of pre-icing which must not be performed by the shipper and which could be properly or advantageously performed by the carrier.

"The carrier might furnish the ice with which the bunkers are filled, but it could only do so at a disadvantage, and if compelled to furnish this ice in proper shape and at a price which would be reasonable as compared with the cost of the ice to the shipper at that point, would not care

to do so. If the carrier were allowed to furnish the ice, it could not properly fill the bunkers and seal the car for transportation, since this would require the services of an expert at each separate packing house, nor ought it to be permitted or required to do this inasmuch as the shipper must assume the responsibility of the work having been properly performed.

"The only service required of the carrier is to provide the car, set it at the packing house, and when loaded haul that car within a reasonable time to its destination and there make delivery in the same condition in which it was received. The mere fact that ice is used in connection with this shipment no more makes the process of pre-cooling a transportation service than as though ice were placed in the receptacle containing the article to be shipped and not in the bunker of the car. Fish and poultry are very often shipped in barrels filled with ice, but it will not be claimed that for this reason the carrier has the right to furnish the ice which is placed in the package nor to decline to receive the package because it does contain this ice.

"But while in our opinion the process of pre-cooling as above defined is not a transportation service, since it is performed by the shipper and can not be performed by the carrier, it does nevertheless take the place of refrigeration, and if these defendants had provided and were prepared to furnish refrigeration which would answer the same purpose as pre-cooling at substantially the same price then it might perhaps be held that the shipper should avail himself of the refrigeration which the carrier was prepared to furnish; but that situation is not here presented. This record shows that the cost to the shipper of refrigeration when furnished by the railroad in any one of the several forms offered is upon the average from $30 to $35 a car

greater than the cost of pre-cooling. The complainants urge that they have the legal right to pre-cool and that this right can not be denied them by this Commission. Without expressing any opinion upon that proposition, we are clear that until the carriers offer a substitute for pre-cooling which is fairly its equivalent in cost and in efficiency, it is the right of the shipper to avail himself of this privilege. As stated in our former opinion, the difference in expense applied to all the carloads of citrus fruits which are now refrigerated in transit would equal $600,000 per year. It is a singular proposition that this enormous waste must continue indefinitely and increasingly because these carriers have made an investment the value of which will be impaired if the privilege to pre-cool be accorded.

"We are of the opinion that shippers have the right to pre-cool; that $7.50 per car is a reasonable charge to be made by the carriers for their service, as stated in the former opinion in that connection; that the tariffs withdrawing this charge are unlawful; and that the present tariffs or their equivalent should be continued in effect."

In re Pre-Cooling and Pre-Icing, 23 I. C. C. Rep. 267, 269.

See also—

Westbound Trans. Refrig. Charges, 34 I. C. C. Rep. 140, 144.
Providence Fruit & Pro. Exchange vs. N. Y. C. & H. R. R. R. Co., 33 I. C. C. Rep. 294, 296.
Kemer Truck Farmers' Assn. vs. I. C. R. R. Co., 32 I. C. C. Rep. 1, 7, 10.
Pacific Fruit Exchange vs. S. P. Co., 32 I. C. C. Rep. 48.
A. T. & S. F. Ry. Co. vs. U. S., 204 Fed. Rep. 647, 653.
A. T. & S. F. Ry. Co. vs. U. S,. 232 U. S. 199, 219, 220.

§ 7. Pre-cooling of Peaches.

The investigations made by the Department of Agriculture indicated that peaches from Georgia should be thor-

oughly pre-cooled before being offered for transportation. When this is done not only may they be moved with safety even when loaded practically to the capacity of the car, but they will stand cold storage with some degree of satisfaction for several weeks after their arrival at destination. When loaded in a heated condition there is a tendency to accelerated ripening and decay, and if any of the peaches so loaded are infected with brown rot the disease rapidly spreads to the other crates of sound peaches. If the peaches have been bruised in packing or handling the deterioration is then very rapid. These conditions are inherent in the character of this commodity when offered for transportation. The carriers in their tariffs undertook to supply refrigeration, but this fact, said the Commission, cannot be interpreted as an offer on their part to overcome physical conditions and characteristics that are natural to the traffic. Nor can it be interpreted as an assumption by the carrier of the burden of preparing the fruit properly for shipment. "Some responsibility rests upon the shippers to improve the conditions under which their traffic is offered for transportation. The experiments conducted show that this can be done to the great benefit of the shipper and the carrier alike, and also to the benefit of the public."

Ga. Frt. Exchg. vs. S. Ry. Co., 20 I. C. C. R. 623, 627, 628.

§ 8. Basis of Refrigeration Charges.

The Supreme Court of the United States has held that the carrier is entitled to receive in compensation for its refrigeration service the cost thereof plus a reasonable profit. That the carrier may lawfully exact a fair compensation for refrigeration service is also recognized by the Commission, but what is fair must be determined with

respect to its service as a whole. Fundamentally, then, non-refrigerated traffic should be hauled at lesser rates than refrigerated freight.

The cost of the service is a factor in refrigeration that varies with the location of the shipping points and the source and cost of ice. Refrigerator cars are hauled empty in the return movement more frequently than ordinary equipment, and the carrier is entitled to make reasonable requirements as to minimum weights of shipments in order to conserve the efficiency of its refrigerator equipment. The cost of the service to the carrier is also increased by the extra dead-weight in a refrigerator car.

It is obvious because of the great diversity in conditions under which refrigerated shipments must be handled and transported that the facts in each case must be considered and the compensation for the refrigeration service based upon such facts. The cost of ice and of the hauling of it, including extra switching maintenance of the refrigerator equipment, mechanical inspection of the body of the car exclusive of running gear, inspection of bunkers to ascertain amount of ice required, liability for damage to contents of car, and the overhead expenses of the carrier properly distributable to this class of its traffic, are all items of expense to the carrier in performing refrigeration service.

It is the prevailing practice to separate the refrigeration charge from the transportation rate proper, and the Commission has declared that in determining the reasonableness of the refrigeration charge the theory of differential costs should be adhered to. Under this theory the refrigeration rate should cover, among other cost items, the expense of hauling the weight of the ice in the refrigerator car and also the cost of extra switching.

In considering these elements of expense in the deter-

mination of the reasonableness of a refrigeration charge, the Commission in the California Commission case said:

"A brief description may be made of the service to which the refrigeration rates apply. The refrigeration service, or a large portion of it at least, is furnished by two refrigerator car companies, the Pacific Fruit Express and the Santa Fe Refrigerator Dispatch Company. These companies, while nominally separate from the railroads, are in fact owned and controlled by them, the Pacific Fruit Express, hereinafter called the P. F. E., by the Southern Pacific and the Union Pacific and the Santa Fe Refrigerator Dispatch Company by the Atchison, Topeka & Santa Fe Railway Company. As compensation the car companies receive the entire refrigeration rate collected by the railroads, and in addition car-rental charges of from three-fourths of a cent to one cent per mile for the distances traveled in both directions.

"Practically all of the deciduous fruit traffic moves under refrigeration. The operation in the case of a typical movement from the Sacramento district to Chicago is as follows: The cars are sent to the initial icing station, Roseville, Cal., where the bunkers are iced to capacity. After this pre-icing the car is then sent to the shipping point and loaded. It returns to Roseville and the bunkers are again filled before it starts on its journey eastward. In the movement to Chicago via Ogden, the Union Pacific and the Chicago & North Western, it is re-iced at the following stations: Truckee, Cal.; Carlin, Nev.; Evanston, Wyo.; North Platte and Omaha, Neb., and Clinton, Iowa.

"The principal contentions of both complainant and defendants have to do with the cost of the service. There is a disagreement at the outset as to the various items which should be considered in the calculation of the total refrigeration cost. The California Railroad Commission

contends that this cost should include only (1) the cost of ice used, and (2) a sum of $5 per car per trip for damage to the ice bunkers allowed by this Commission in the Arlington Heights case, 20 I. C. C. 106, the case which concerned the refrigeration charge on California citrus fruits. Defendants, on the other hand, in exhibits showing the amounts of the refrigeration costs, include (1) the cost of ice; (2) damage to bunkers; (3) supervision, which includes inspection and certain overhead charges; and (4) cost of hauling the weight of ice carried in the refrigerator car. Defendants, in general, adopt the theory applied by this Commission in the Arlington Heights case, supra, that since refrigeration is a service separate from, and additional to, ordinary transportation, for which a separate and additional charge is imposed, into this charge should enter all the elements of cost which are incurred solely in furnishing the refrigeration service; that is, the elements which are additional to the service without refrigeration.

"It may be noted here that this Commission held in the Arlington Heights case, supra, that a charge for the use of the special refrigeration car should not be included in the additional charge for refrigeration, since this charge was included in the freight rate of $1.15 applicable alike to shipments of citrus fruit in refrigerator cars under ventilation and under refrigeration. The same holding is proper here in the case of the deciduous fruit traffic.

"The Califonia commission apparently takes issue with this general theory of additional cost and particularly with the inclusion of the item of the cost of hauling ice, and also an item for extra switching, which is contended for by the carriers though not included in their schedule of total cost. It argues that the ice-haulage charge should not be included in the refrigeration rate because this service is performed not by the refrigerator company, but by

the railroads, and it contends, moreover, that this item is, as a matter of fact, included in the typical $1.15 deciduous freight rate. It attempts to distinguish the Arlington Heights case, which allowed this item as part of the refrigeration rate, by arguing that the decision there was based on the fact that the testimony showed that only about half of the citrus fruit movement is under refrigeration, the other half moving under ventilation, and that, consequently, if it had been held that the item of ice haulage was a part of the freight rate the result would have been that the shipper who forwarded his citrus fruit under ventilation would have been compelled to pay for a service incident to refrigeration, which he did not receive. It is argued that the same decision is not necessary or proper in the present case for the reason that practically all of the deciduous fruit moves under refrigeration.

"These contentions raise two questions: First, whether the items in question are, as a matter of fact, covered by the present freight rate rather than by the refrigeration charge; and, second, whether they should properly be included in the freight rate or in the refrigeration charge.

"The question of fact as to whether the ice-haulage item was included in the freight rate was one of considerable difficulty in the decision of the Arlington Heights case, principally because of a practice, as testified by one official of a refrigerator company, of keeping this and other items 'suspended in air between the regular freight rate and the refrigeration rate,' and charging it to one or the other as either of the two different charges were attacked. The objections to such a condition are obvious, and it seems essential to correct rate making, as it certainly is to a just determination of the reasonableness of the different charges whenever they may be questioned, that there be an

agreement and a fixed practice as to the allocation of the constituent elements of cost between the two services.

"We are of opinion upon the present aspects of the matter that under the prevailing practice of separate charges the theory of differential costs outlined above is the one that should be adhered to. Under such a theory the item of ice haulage and also of extra switching should be included in the refrigeration charge. This is so even though, as in the present case, practically the entire movement of the commodity in question is under refrigeration rather than part under ventilation and part under refrigeration.

"It was held in the Arlington Heights case that the argument that the service of hauling the ice was performed not by the refrigerator company but by the railroad does not establish that this item should not be included in the refrigeration charge; that the railroad company is responsible both for the transportation and the refrigeration service; and that the reasonableness of the refrigeration charge should be determined exactly as though the service were rendered by the railroad company itself, and irrespective of the consideration as to how the railroad might divide the total revenue with the separate company with which it had contracted for furnishing part of the refrigeration service. It may be observed, however, that on the surface there is an incongruity, at least where the railroad, as the Western Pacific Company in this case, is not associated in interest with the refrigerator car companies, in the railroad's furnishing part of the refrigeration service, the ice haulage, and still turning over the entire refrigeration revenue to the refrigerator company. Although there are not data of a kind to warrant the conclusion in this case, it would seem that this situation might well go to establish the charge that the railroad is in this regard not

properly conserving its revenues. This is undoubtedly the conclusion unless it be, as is suggested but certainly not proven, that the refrigerator companies are operating on a low margin of profit. In this connection it is interesting to note that on all its business, refrigerator and other, the P. F. E. during the last fiscal year paid a 10 per cent dividend, amounting to $1,080,000, and added $75,543 to its surplus. The company has an authorized capital stock of the par value of $12,000,000, $10,800,000 of which has been issued. There are no bonds outstanding, and no indebtedness other than a few open-book accounts. None of the property is encumbered.

"As to the question of fact, we can not find that complainant has proven its assumption that these items of ice haulage and extra switching are included in the freight rate. This Commission found in the Arlington Heights case, with respect to the standard refrigeration charges on citrus fruits, which, upon consideration of the other items of cost, appear to be on relatively the same basis as the present refrigeration rates on deciduous fruit, that the item for ice hauling was not included in the $1.15 freight rate. We see no sufficient ground to reach the opposite conclusion here and to hold that this item, which, amounting to some $20 per car per trip, makes up a considerable portion of the total refrigeration rate, is in the case of deciduous fruit included in the $1.15 freight rate. We are unable to agree with complainant's contention that the Commission's decision regarding the refrigeration rate to be applied to pre-cooled shipments of citrus fruit, and more particularly in the decision of the Supreme Court in Atchison, Topeka & Santa Fe Railway Company vs. U. S., 232 U. S. 199, 219-220, reviewing this decision, show that the cost of hauling the ice does not properly belong in the refrigeration rate. It appears from both

decisions that compensation for this service should be included in the refrigeration charge, but that an equivalent sum was not included by the Commission in the refrigeration rate established for pre-cooled shipments for the reason that under the peculiar facts of the pre-cooled fruit movement a revenue applicable to this item of ice haulage existed in the freight rate. For convenience this exceptional arrangement was allowed to stand.

"The following consideration of the cost figures under the different items entering the refrigeration charge will have to do, in the main, with the figures obtained from the records of the Pacific Fruit Express Company, both complainant and defendant having relied almost entirely on these records.

"Regarding the cost per ton of the ice used in the refrigerator cars it is to be noted that representatives of the California commission had access to the books of the P. F. E., from which they, as well as defendants, prepared exhibits showing the cost of ice manufactured or harvested at the several ice plants of the P. F. E., and also the cost of ice issued at these plants and other points where cars are re-iced. The average per ton ice costs for the principal plants as submitted by contending parties show, however, the following differences:

	California commission data.	P. F. E. data.	Difference per ton.
Roseville	$2.36	$2.53	$0.17
Colton	1.92	2.10	.18
Carlin	2.55	3.45	.90

"Complainant figures also a cost of $2.26 per short ton for the 'entire system,' apparently of the Southern Pacific Company, and concludes that the average cost of ice handled by the P. F. E. delivered into car bunkers, includ-

ing the cost of the ice purchased and placed direct into bunkers both on lines of the parent company and on foreign lines does not exceed $2.50. Defendants, on the other hand, conclude that the average cost per ton of all ice placed in the 154 test cars mentioned below is $2.88.

"Defendant's higher cost figures for the Roseville and Colton plants include interest on pre-cooling plants of the P. F. E. operated in connection with the ice plants at these two points. It appears that only a comparatively small number of cars are pre-cooled at these plants, the pre-cooling service, while afforded free, being furnished only upon the express request of the shipper. It seems proper, under these circumstances, that this additional expense should be charged only to the shipper who requests the service and should not be imposed as a burden on other shippers who do not require and are not given it. In the case of the Carlin plant the difference is due to two facts: First, that the complainant failed to include as a part of the cost the item of plant depreciation, which should properly be included; second, there is a difference between complainant and defendants in the ways in which maintenance and running expenses are assigned. Complainant's method of assigning these expenses to the tonnage produced and not simply issued is the one accepted by defendants in the case of the other plants and there seems to be no good reason why in calculating the cost of ice at Carlin a different method should be used.

"Apart from these differences between complainant and defendants, there is another factor not in issue between them which may be taken into account. A considerable portion of the ice supplied by the P. F. E. in its refrigeration service is loaded into the cars out of ice houses to which it is shipped from the company's ice plants or supply. The cost of the ice at these points is made up of the cost

of the ice at the point of shipment, the freight charge for the transportation of the ice, and the cost of handling it into the ice houses and into the cars. The freight charges on the ice differ on the lines of the Atchison, Topeka & Santa Fe and those of the Southern Pacific Company, the former charging such shipments at company rates and the latter at commercial rates. Since in accord with the theory discussed above the reasonableness of the refrigeration charge is to be determined as if the service was rendered by the railroad company, it would seem that the practice of the Southern Pacific Company of charging commercial rates on P. F. E. shipments of ice from ice plants to icing stations may unduly increase the cost shown for most of its icing points and may give rise to more than reasonable profits, if such profits are allowed also on the entire refrigeration service. While no determination is here made as to the propriety of these freight rates as between the two companies, the Commission in its calculation of costs has used figures for this item of ice transportation corresponding to the company rather than the commercial rates. So far as this record is concerned, ice costs calculated upon the basis followed by the Commission may be termed minimum costs.

"It is found that the company freight rates on ice of the Santa Fe coast lines vary between 5 and 10 miles per ton-mile, the arithmetical average being about 6.3 mills, including meltage. The commercial rates charged to the P. F. E. are not less than 9 mills per ton-mile and vary from 12 mills for a 128-mile haul between Boca, Cal., and Sacramento to almost 4 cents per ton-mile for the 18-mile haul between Roseville and Sacramento. If, in calculating the average cost of ice at Roseville, for example, the tonnage brought by rail from Boca is segregated and the excess freight charged reduced to the company-rate basis,

the average cost of ice at that point is brought down to about $2.28 per ton as compared with defendants' figure of $2.36. We are of opinion that corrections similar to that described in the case of Roseville may be made in both complainant's and defendants' figures for costs per ton at various other icing stations and such corrections have been made by this Commission in its determination of the per ton costs.

"To calculate the average number of tons of ice consumed per car both the California commission and the defendants use the icing records furnished by the P. F. E. on a list of 154 cars, designated by the California commission, which had moved from California to eastern points. The California commission computes the average number of tons per car in the cases of various destinations, finding that the amount in a car destined to Denver is 11.7 tons; to New Orleans 18.37 tons, and to Chicago 12.9 tons. These averages are undoubtedly low, since no account is taken of the actual distribution of car movements by months, and consequently of the greater consumption in the hotter months.

"In its study of costs this Commission considered that on the whole it would be fair to select the average Chicago haul as typical of the entire movement and to restrict all cost calculations to this one movement, since over half of the traffic moves to Chicago and east. In pursuance of this plan it considered 24 cars of the total list, which were destined to Chicago. The average consumption of ice per car was found from the icing records for each month separately and the monthly average weighted by using the monthly percentages of the entire car movement handled by the Pacific Fruit Express during the 1913 season. Using this method the average ice consumption per

car of the cars destined to Chicago was found to be 13.69 tons.

"As to the cost of the ice used in these 24 cars, it was first found that the total tonnage of the cars in question was 310.03. Using the cost per ton corrected in accord with the basis suggested above and in the other particulars noted, the total cost of this tonnage was found to be $785.73, which gives an average minimum cost per ton of ice of $2.53. Accordingly the average minimum ice cost per car to Chicago, using this cost per ton and the proper average tonnage of $13.69, was found to be $34.64.

"Regarding the item of the haulage cost of the ice carried in the refrigerated car, which, as indicated above, should be included in the refrigeration rate, it appears that the allowance of $20 made by this Commission in the Arlington Heights case, supra, should be somewhat increased, as the average load of ice in transit seems to be higher in the case of the deciduous than was shown for the citrus fruit movement, a greater proportion of the former moving in the hotter months of the year. The method employed by defendants to calculate the average load of ice carried per car assumes a rate of meltage identical over the entire mileage between the various icing stations and undoubtedly results in somewhat overstating the average tonnage carried, since the meltage is normally larger immediately after loading than during the latter states of the movement between stations. It appears furthermore that while the actual quantity of ice placed in the car bunkers during the hot summer months is larger than that placed during the fall and winter months, the average ice tonnage carried during the hot months is less. It is probable that a fair average weight of ice carried, on the basis of the icings shown in respondent's exhibit, would be not less than 4.5 tons per car for the entire season.

On the basis of the allowance made in the Arlington Heights case, supra, the cost figure to be allocated to this item in the case of the Chicago car is $22.50.

"We are of opinion upon the facts of record that something should be allowed, in addition to the cost of ice as found above, for the costs which defendants include under the head of supervision. This item includes the cost of superintendence and inspection, stationery and printing, and general expenses, the latter representing 70 per cent of the salaries and expenses of the offices of vice president and general manager and auditor of the P. F. E. Defendant's calculations, however, are subject to revision for the following reasons: They include a sum for inspection of cars which the Arlington Heights case, supra, disallowed as part of the additional costs of refrigeration. The assignment of the portion of all supervision expenses to be allotted to the refrigeration service is not an assignment of the additional or differential expenses of the refrigeration movement over the movement under ventilation, which is covered by the freight rate. Finally, no account seems to have been taken of the fact that a certain portion of the cars in question are, principally in the westbound movement, loaded with ordinary freight and consequently should not be charged with any portion of the cost of extra supervision on the part of the P. F. E. With corrections on these bases we find that the average additional cost of supervision per car of refrigerated fruit is but about $3, and that this sum would be a sufficiently high allowance to include in the costs of the Chicago car.

"The item of $5 per car per trip for damage to the ice bunkers was assumed by defendants from the Arlington Heights case and was not questioned by complainant. It was testified, moreover, on behalf of defendants that this allowance was a fair one, and while we have not before

us data upon which it possibly might be revised, we are disposed to the opinion that this sum is ample to cover not only this damage, but also the excess damage from refrigeration to other parts of the car.

"While defendants did not include in their summary of costs the item of extra switching expense, they insisted that this item was properly chargeable to the refrigeration service, and testified that the average expense for switching would be about 25 cents per car for each switching movement. This does not seem excessive. In the case of Chicago shipments the P. F. E. cars are normally re-iced seven times, and at this rate the extra switching cost would be about $1.75 per car. We are of opinion that this is a differential cost properly attributable to refrigeration, and we do not find that this item is covered by the freight rate. We hold, therefore, that it should be included in the refrigeration costs.

"Under the conclusions above, the refrigeration costs of a car of deciduous fruit moving from California to Chicago may be summed up as follows:

Minimum cost of ice	$34.64
Haulage cost of ice	22.50
Additional cost of supervision	3.00
Additional damage to car	5.00
Extra switching	1.75
Total	$66.89

"The estimates of the ice cost include a 6 per cent return on the original investment of ice houses, plants, machinery, etc. The summary of refrigeration costs, however, does not include any allowance for excess depreciation of cars in the refrigeration service in addition to the item for repair of damages nor for claims attributable to the refrigeration service, nor for profits on the service.

"The present refrigeration rate to Chicago under attack is $75 per car. This, it will be observed, is $8.11 higher than the costs stated above. In the Arlington Heights case, supra, this Commission found that under a refrigeration rate on citrus fruit to Chicago of $62.50 the total costs were $55, leaving a margin of $7.50 to cover 'a certain element of risk which the carrier must assume in the rendering of this service, and, as was held in Southern Ry. Co. v. St. Louis Hay & Grain Co., 214 U. S. 297, a fair profit upon the transaction.' It would seem that, judged by the test of cost of service, the present rate to Chicago, which has been selected as a typical one, in that more than half of the movement is to points Chicago and east, is not excessive.

"In addition to the cost data, complainant instances the refrigeration rates on deciduous fruit from Oregon and Washington, which are lower than the California rates, the rate to Chicago, for example, showing a difference of $15 per car. Defendants reply that the total refrigeration and freight rate is higher from the north coast; that the history of the refrigeration rates on the Great Northern and Northern Pacific, which furnish their own service, shows that it is only recently that attempt has been made to fix these rates on a basis similar to the California one—originally no refrigeration charge having been made—and that the rates on the Oregon-Washington Railroad & Navigation Company are depressed below a proper level by the competition of the other roads. Defendants' moreover, compare the California refrigeration rates with the rates from Georgia, Florida, Arkansas, Missouri, Louisiana and Texas, showing that, distance considered, the California rates are lower than those from the other states named."

R. R. Com. of California vs. A. G. S. R. R. Co., 32 I. C. C. Rep. 17, 18.

The Supreme Court has also sanctioned the adding to these expenses of a certain element of risk which the carrier must assume in the rendering of this service, and a fair profit upon the transaction.

So. Ry. Co. vs. St. Louis Hay & Grain Co., 214 U. S. 299.

See also—

Westbound Transcontinental Refrigeration Charges, 34 I. C. C. Rep. 140, 144.
Montrose & Delta Counties Freight Rate Assn. vs. D. & R. G. R. R. Co., 34 I. C. C. Rep. 400, 406, 408.
Hume Co. vs. S. P. Co., 33 I. C. C. Rep. 126, 127.
Rates on Tomatoes from Jacksonville to Kansas City, 33 I. C. C. Rep. 145, 148.
Lindsay & Co. vs. No. Ex. Co., 33 I. C. C. Rep. 394, 399.
R. R. Com. of California vs. A. G. S. R. R. Co., 32 I. C. C. Rep. 17, 20, 23.
California Fruit Growers' Assn. vs. A. G. S. R. R. Co., 32 I. C. C. Rep. 51.
Refrigeration Rates from New Orleans, 31 I. C. C. Rep. 637, 638.
Pacific Fruit Exchange vs. S. P. Co., 32 I. C. C. Rep. 48.
Kenner Truck Farmers' Assn. vs. I. C. R. R. Co., 32 I. C. C. Rep. 1, 7, 10.
Rates on Bananas from Gulf Ports, 30 I. C. C. Rep. 510, 516.
Refrigeration Charges on Fruits and Vegetables, 29 I. C. C. Rep. 653, 657.
Refrigeration of Fruits and Vegetables, 28 I. C. C. Rep. 326.
Western Fruit Jobbers Assn. vs. C. R. I. & P. Ry. Co., 27 I. C. C. Rep. 417, 423.
Refrigeration Charges on K. C. S. Ry., 26 I. C. C. Rep. 617, 620.
Mason Bros. vs. S. P. Co., 25 I. C. C. Rep. 35.
In re Advances on Demurrage Charges, 25 I. C. C. Rep. 314, 318.
Advances on Fruits and Vegetables under Refrigeration, 24 I. C. C. Rep. 164, 165, 166.
Jackson & Perkins Co. vs. S. P. Co., 24 I. C. C. Rep. 323.
Crutchfield & Woolfolk vs. S. P. Co., 24 I. C. C. Rep. 651, 653.
In re Pre-Cooling and Pre-Icing, 23 I. C. C. Rep. 267, 269.
Advances on Meats, etc., 23 I. C. C. Rep. 656, 671.

Arlington Heights Fruit Exchange vs. S. P. Co., 22 I. C. C. Rep. 149, 153.
Albree vs. B. & M. R. R. Co., 22 I. C. C. Rep. 303, 322.
Sweeney, Lynes & Co. vs. N. Y. P. & V. R. R. Co., 20 I. C. C. Rep. 600.
Arlington Heights Fruit Exchange vs. S. P. Co., 19 I. C. C. Rep. 148, 154.
Asparagus Growers' Assn. vs. A. C. S. R. R. Co., 17 I. C. C. Rep. 423, 427, 429.
Ozark Fruit Growers' Assn. vs. St. L. & S. F. R. R. Co., 16 I. C. C. Rep. 106, 115.
Ozark Fruit Growers' Assn. vs. St. L. & S. F. R. R. Co., 16 I. C. C. Rep. 153.
Florida Fruit, etc., Assn. vs. A. C. L. R. R. Co., 14 I. C. C. Rep. 467.
Fain & Stamps vs. A. C. L. R. R. Co., 13 I. C. C. Rep. 529, 530.

§ 9. "Shipper's Icing" Plan.

Refrigeration of shipments under the "shipper's icing" plan consists of icing shipments en route under instructions from the shipper at a certain charge per ton for ice, usually $2.50 per ton. This method of icing is distinguished from standard refrigeration by carriers by the fact that the latter service is charged for at a stated rate applied to a unit as "per car," "per package," or "per 100 pounds," from loading station to destination or on a considerable portion of the haul.

The Commission in its reports has not favored the "shipper's icing" plan, but has uniformly sanctioned a reasonable fixed charge by the carriers for refrigeration service, allowing, in many instances, substantial increases over the former refrigeration charges because of the increased cost of the service to the carriers in recent years.

There are many objections urged against the "shipper's icing" plan, viz., that there is no uniformity as to the icing required by different shippers, either as to the amount of ice to be furnished or the stations at which re-icing is

desired; confusion arises with train crews determining what cars are moving under "shipper's icing" and what cars are subject to carrier's standard refrigeration; and that under the "shipper's icing" plan the carriers do not receive the cost, to them, of icing the cars.

Refrigeration Rates from New Orleans, La., and other Points, 31 I. C. C. Rep. 637.
Refrigeration Charges on Fruits and Vegetables, 29 I. C. C. Rep. 653, 654.

§ 10. Payment of Charges on Minimum Weight to Obtain Free Icing.

A consignor having a shipment of dressed poultry weighing 9,910 pounds offered to pay freight charges on the basis of 10,000 pounds in order to have the advantage of free icing under a tariff rule providing that the cost of icing would not be assumed by the carrier when the weight in each car was less than 10,000 pounds; but the carrier refused to accept the 77 cents additional freight charges and compelled the shipper to pay $5.25 for the icing. The Commission held, in analogy to the common practice of carriers to apply the carload rate and minimum on shipments of less weight where the application of the less-than-carload rate would result in higher charges, that such a tariff rule, if susceptible of the construction placed upon it by the carrier, in this instance was unreasonable, and ought to be amended.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 152.

CHAPTER V.

INTERCHANGE OF TRAFFIC BETWEEN CARRIERS.

§ 1. Necessity for Interchange.
§ 2. Statutory Requirements.
§ 3. Continuous Carriage of Shipments Required by Act to Regulate Commerce.
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§ 5. Tug Boat Line May Not Demand Joint Rates because of Interchange of Traffic of Industries Owning the Boat.
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(1) For Live Stock.
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CHAPTER V.

INTERCHANGE OF TRAFFIC BETWEEN CARRIERS.

§ 1. Necessity for Interchange.

The broad intent of the regulatory legislation, that the carriers subject to the Act to Regulate Commerce shall become constructively a national railway system, is in furtherance of the constitutional requirement that the movement of commerce between the states shall be free and unhampered. Essential to a realization of this broad purpose, is the competent exchange of equipment and traffic between carriers.

Paragraph 2 of Section 3 of the Act not only provides for the "receiving" and "delivering" of traffic by connecting carriers, but also for the "forwarding of passengers and property" and "interchange of traffic" in general.

§ 2. Statutory Requirements.

The Act to Regulate Commerce is explicit in its requirements. Section 3 provides:

"Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges

between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Section 20 declares:

"That any common carrier, railroad or traansportation company receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or a bill of lading therefor."

Section 1, after defining "transportation," provides:

"It shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 7 also provides:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the

place of destination; and no break of bulk stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act."

Section 15, as now amended, reads:

"The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The Commission shall not, however, establish any through route, classification or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the Commission have the right to establish any route, classification, rate, fare or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

"And in establishing such through route the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire

length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established."

Compare these provisions with the common law rule laid down by the Supreme Court in Atchison, etc., R. Co. vs. Denver, etc., R. Co., 110 U. S. 667, where the court said:

"At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use."

Secs. 1, 3, 7, 15, 20. Act to Regulate Commerce as amended.

See also—

Pac. Nav. Co. vs. S. P. Co., 31 I. C. C. Rep. 472, 480.
Burford vs. L. & N. R. R. Co., 31 I. C. C. Rep. 182, 184.
Seattle Chamber of Commerce vs. G. N. Ry. Co., 30 I. C. C. Rep. 683, 690.
B. R. & P. Ry. Co. vs. Pa. Co., 29 I. C. C. Rep. 114, 118.
Waverly Oil Works Co. vs. P. R. R. Co., 28 I. C. C. Rep. 621.
Morris Iron Co. vs. B. & O. R. R. Co., 26 I. C. C. Rep. 240, 244.
St. L. S. & P. R. R. Co. vs. P. & P. U. Ry. Co., 26 I. C. C. Rep. 226, 236, 238.
Wichita Bd. of Trade vs. A. T. & S. F. Ry. Co., 25 I. C. C. Rep. 625, 631.

Flour City S. S. Co. vs. L. V. R. R. Co., 24 I. C. C. Rep. 179, 184.
P. S. C. of Wash. vs. N. P. Ry. Co., 23 I. C. C. Rep. 256, same case, I. C. C. Rep. 272.
Missouri & Illinois Coal Co. vs. I. C. R. R. Co., 22 I. C. C. Rep. 39, 44, 49.
Panna Co. vs. U. S., 236 U. S. 351.

§ 3. Continuous Carriage of Shipments Required by Act to Regulate Commerce.

From a mere reading of the provisions of the Act to Regulate Commerce, as set forth in the last preceding section, it is clear that the fixed purposes of Congress was to secure through carriage and the freest possible interchange of traffic along and over all lines and routes where physical connections and conditions for such interchange exist, both in the interest of commerce and the impartial treatment of connecting carriers.

I. C. C. Ann. Rep. 1895.

§ 4. Regulations Governing Construction and Operation of Physical Interchange Facilities.

A railroad company can not demand an interchange of traffic with a connecting carrier without first providing at the point of physical connection, reasonable and proper facilities for the interchange sought. Neither can it compel the receiving carrier to go to any expense in providing such facilities.

L. R. & M. R. Co. vs. St. L. I. M. & S. R. Co., et al., 59 Fed. Rep. 400; affirmed in 63 Fed. Rep. 775.

While the Act to Regulate Commerce, by the provisions of section 3 thereof, requires every common carrier subject to its provisions, according to their respective powers, to afford all reasonable, proper and equal facilities for the

interchange of traffic between their respective lines, it expressly declares that this requirement "shall not be construed as requiring any such common carrier to give the us of its tracks or terminal facilities to another carrier engaged in like business."

Act to Reg. Com., sec. 3, par. 2.

Compare—

K. & I. Brdg. Co. vs. L. & N. R. R. Co., 37 Fed. Rep. 567, refusing to enforce an order of the Commission directing an interchange, and holding that where a carrier had already established interchange facilities with its connections at a certain point within a city, it could not be required to establish similar facilities at another place in the same city with another line.

While it might appear complimentary, in view of the comprehensiveness of the other provisions of the Act theretofore recited, nevertheless the statute lays the further mandate upon the carriers subject to its provisions to make reasonable rules and regulations with respect to the "exchange, interchange and return of cars used" in the through routes required by the Act, "and to provide for reasonable compensation to those entitled thereto."

Act to Reg. Com., sec. 1, par. 2.

And where the carriers have failed in this respect the Commission is empowered to determine the individual or joint regulation or practice that is just, fair and reasonable.

M. & I. Coal Co. vs. I. C. R. R. Co., 22 I. C. C. R. 39.

See also—

St. L. S. & P. R. vs. P. & P. U. Ry. Co., 26 I. C. C. Rep. 226, 236.

But the Commission has felt constrained in applying the provisions of the Act to observe the apparent and physical requirements of the third provision prohibiting the opening of terminals to competitors.

New England Investigation, 27 I. C. C. Rep. 560, 608.
Morris Iron Co. vs. B. & O. R. R. Co., 26 I. C. C. Rep. 240, 244.
Chamber of Commerce of New York vs. N. Y. C. & H. R. R. R. Co., 24 I. C. C. Rep. 55, 75.
R. R. Com. of Ark. vs. St. L. I. M. & S. Ry. Co., 24 I. C. C. Rep. 292, 295.

Compare—

City of Nashville vs. L. & N. R. R. Co., 33 I. C. C. Rep. 76, 86, 90.
Mixed Car Dealers Assn. vs. D. L. & W. R. R. Co., 33 I. C. C. Rep. 133, 142.
Grain Rates from Milwaukee, 33 I. C. C. Rep. 417, 420.
Chattanooga Packet Co. vs. I. C. R. R. Co., 33 I. C. C. Rep. 384, 391.
Doran & Co. vs. N. C. & St. L. Ry. Co., 33 I. C. C. Rep. 523, 530.
Switching at Galesburg, Ill., 31 I. C. C. Rep. 294, 297.
Pac. Nav. Co. vs. S. P. Co., 31 I. C. C. Rep. 472, 480, 481.
P. & S. W. Coal Co. vs. W. P. T. Ry. Co., 31 I. C. C. Rep. 660, 663.
Seattle Chamber of Commerce vs. G. N. Ry. Co., 30 I. C. C. Rep. 683, 690.
Lombard Brick & Tile Co. vs. C. & N. W. Ry. Co., 30 I. C. C. Rep. 84, 85.
B. R. & P. Ry. Co. vs. Penna Co., 29 I. C. C. Rep. 114, 118.

§ 5. Tug Boat Line May Not Demand Joint Rates Because of Interchange of Traffic of Industries Owning the Boat.

In a case where a company engaged in the sale and distribution of oils and fuel transferred its barges and tugboats to an operating company, incorporated by it for the

purpose, the stock of which operating company the industry owned, and the operating company thereafter complained to the Commission asking for through routes and joint rates to certain landings to which it did not carry any substantial traffic for other shippers, the Commission held that the services performed by the operating company for the industry were not services of transportation, and the mere fact that the operating company had been incorporated as a common carrier and was able to pick up some traffic for other interests gave it no right to demand joint through rates with the defendant carriers, and thus compel the carriers to contribute to the expense of its operation.

Gulf Coast Nav. Co. vs. K. C. S. Ry. Co., et al., 19 I. C. C. R. 544.

See also—

K. C. Mo. Riv. Navigation Co. vs. C. & O. Ry. Co., 34 I. C. C. Rep. 67, 73.

§ 6. Effect of Reciprocal Switching Arrangement Previously Entered Into.

Whether a carrier could be compelled to establish reciprocal switching arrangements was not decided, but the Commission, in Crescent Coal & Mining Co. vs. B. & O. R. R. Co., 20 I. C. C. R. 559, 565, held that having entered into such arrangement, the carrier must accept shipments for delivery to the extent of its capacity.

See also—

Hammerschmidt & Franzen Co. vs. C. & N. W. Ry. Co., 30 I. C. C. Rep. 71, 81.

Mobile Chamber of Commerce vs. M. & O. R. R. Co., 32 I. C. C. Rep. 272, 279.

Gravel and Sand Switching Charges at Chicago, 32 I. C. C. Rep. 291, 292.

Merchants & Manufacturers Assn. vs. P. R. R. Co., 32 I. C. C. Rep. 434.

Compare—

In re Advances on Ice, 24 I. C. C. Rep. 660.
Morris Iron Co. vs. B. & O. R. R. Co., 26 I. C. C. Rep. 240, 244.

§ 7. Transfers and Facilities.

The Act to Regulate Commerce does not bar a carrier from providing for costs of transfer in making delivery to a second carrier, but if it so provides it must publish and file a tariff showing where the transfer will be made, the kind of transfer service required, and the rates and charges to be exacted therefor. When it has done that, it can lawfully, and it must, exact from the shipper the rates and charges so fixed. Such charges and the means employed must, however, be reasonable under the circumstances and conditions that surround the transfer. Any other rule would permit carriers to dictate junction point transfers at will, both as to kind of service and amount of charges therefor, and thus would open the way to unknown rates and charges and create opportunities to indulge in unjust discriminations and undue preferences. The shipper is entitled to notice of a transfer charge other than one coming to him through the collection of the charge from his consignee, and as he is not obliged to follow his shipment and make the transfer himself, he is entitled to the protection afforded by a published definite rate.

A carrier cannot excuse the collection of an unpublished and unknown drayage and transfer charge by proof that it had a rule which forbade the sending of its own cars beyond its own line during a period of car shortage and congestion of business.

This defense would be especially unavailable where no notice of the rule, either actual or by reference in a published tariff, had been brought to the shipper.

Schwager & Nettleton vs. G. N. R. Co., 12 I. C. C. R. 521.

Where, however, connecting lines have united in publishing a joint through rate between two points, it is the ruling of the Commission that the duty of the carriers in the route is to provide the car and permit it to go through to destination or to transfer the property en route to another car at their own expense.

I. C. C. Conf. Rulings Bull. No. 6, Ruling No. 59.

See also—

Germain Co. vs. N. O. & N. E. R. Co., et al., 17 I. C. C. R. 22, 25.

Holding certain transfer services and facilities no part of transportation service, see—

S. W. Prod. Distr. vs. W. R. R. Co., 20 I. C. C. R. 458, 460.

Where a joint through rate is in effect, the through charges on a shipment moving thereunder are not affected by the transfer of the shipment from car to car in transit, whether the transfer be to a larger or smaller car. The through charges should be collected at the joint through rate and on the basis of the minimum weight applicable on the car ordered or accepted by the consignor for the movement.

I. C. C. Confr. Ruling Bull. No. 6, Ruling No. 331.

§ 8. Special Facilities.

Special facilities in connection with the transportation of certain commodities are imperative, as for instance, in the case of live stock. In order to safely handle, load and unload live stock there must be stock pens, chutes and specially constructed slatted cars.

At common law the carrier is under the duty of providing and furnishing facilities necessary or essential to the preservation or protection of any kind of traffic which it undertakes to transport, as was stated in the case of refrigeration and ventilation equipment provided for perishable commodities.

(1) For Live Stock. A railroad company, as a carrier of live stock, is obliged to provide necessary means and facilities for receiving live stock offered to it for shipment and for the delivery thereof to the consignee. The duty of a carrier of live stock to receive, transport and deliver it is not to be fully discharged unless the carrier makes provision at the place of loading to properly receive and load the stock, and provision at the place of unloading to properly deliver the stock to the consignee.

A carrier of live stock may not make a special charge for merely receiving or delivering the stock in and through stock yards provided by itself, and it cannot invest another corporation with authority to impose burdens of that kind upon shippers and consignees.

When a carrier fails to provide suitable facilities for the delivery of live stock contracted to be carried by it, it may be compelled to deliver it through facilities furnished by the consignee.

Keith, et al., vs. Ken. Cent. R. R. Co., et al., 1 I. C. C. Rep. 189, 1 I. C. Rep. 601.

See also—

Covington Stk. Yds. Co. vs. Keith, 139 U. S. 128, 35 L. Ed. 73.

(2) **Heavy Traffic.** There is no requirement under the law, nor in the provision of the Act, for carriers to provide and furnish loading or unloading facilities except of such a character as are necessary to the preservation or protection of a particular commodity which it undertakes to transport. But in the loading of heavy articles, carriers may lawfully either actually load for the shipper or furnish facilities in the way of windlasses, derricks or traveling cranes, as an inducement to shippers for their traffic in the building up of the carrier's business.

Re Allowances to Elevators by Un. Pac. R. Co., 12 I. C. C. R. 85.

It is not uncommon to find facilities by this nature in most of the larger terminals throughout the country; conserving in their use both the convenience and safety of handling heavy commodities.

(3) **Location of Live Stock Depot.** A railroad company may maintain its live stock depot at a designated point, although it neither builds nor repairs nor insures the stock pens into which the stock is unloaded, and does not hire or control the men who do the unloading; and whether the Union Stock Yards at Chicago was in railroad phraseology or in a legal sense, the depot of the railroad was held to be immaterial, for they were, and still are, in fact, the point to which the stock is transported and unloaded under the shipping contract of the carrier.

Cattle Raisers' Assn., etc., et al., vs. C. B. & Q. R. Co., et al., 11 I. C. C. R. 277.

It is now the statutory duty of interstate carriers to furnish such facilities and live stock cars, for carriers are

under the general duty to furnish cars which will convey the commodity safely under ordinary conditions.

Act to Regulate Commerce, sec. 1, par. 1.
Balfour, etc., Co. vs. O.-W. R. R. & N. Co., 21 I. C. C. R. 539, 540.

§ 9. Plant Facilities.

Whether industrial tracks and other facilities for loading and unloading cars and moving them within the confines of an industrial plant constitute a plant facility, is determinable not by the character of the entity rendering the service, but by the character of the service rendered. Thus, a railroad might be a plant facility to a certain industrial plant and at the same time act in the capacity of a common carrier to other industrial plants.

If an industrial road is to be treated as a common carrier, it must serve all industries with which it connects or that offer traffic to it, and then the question arises whether it may still remain a plant facility as to the plant for which it was created. It is repugnant to the law that a railroad may be a common carrier to one person and a private servant to another.

Tap Line Cases, 234 U. S. 1, 58.
Tap Line Case, 35 I. C. C. Rep. 485.
Tap Line Case, 34 I. C. C. Rep. 116.
Car Spotting Charges, 34 I. C. C. Rep. 609.
Industrial Railways Case, 34 I. C. C. Rep. 596.
Industrial Railways Case, 32 I. C. C. Rep. 129.
Tap Line Case, 31 I. C. C. Rep. 490.
Industrial Railways Case, 29 I. C. C. Rep. 212.
Tap Line Case, 23 I. C. C. Rep. 277, 549.

See also—

Buffalo Un. Furnace Co. vs. L. S. & M. S. Ry. Co., 21 I. C. C. R. 620.

Mfgrs. Ry. Co. vs. St. L., etc., R. Co., 21 I. C. C. R. 304, 313.
Kaul Lbr. Co. vs. C. of G. R. Co., 20 I. C. R. R. 450, 455.
Fathauer Co. vs. St. L., etc., Ry. Co., 18 I. C. C. R. 517.
Star Grain & Lbr. Co. vs. Atchison, etc., R. R. Co., 17 I. C. C. R. 338.
Crane Irons Wks. vs. C. R. R. Co. of N. J., 17 I. C. C. R. 514.

In the Star Grain & Lumber Co. case the Commission condemned the mere interposition of a paper railroad corporation between the lumber mill and the carrier which called itself a common carrier and complied with the Act in those respects, but was owned by the mill or its proprietors, as not giving legality to so-called tap-line allowances or meeting the requirements of the Commission, thus disclosing the plant facility nature of the industrial road.

Star Grain, etc., Lbr. Co. vs. Atchison, etc., Ry. Co., 17 I. C. C. R. 338.

The Commission admits the difficulty of drawing the line where the transportation service of the common carrier ends and the service of the plant facility begins. The physical nature of the facility offers little basis for determining this fact. The only apparent test is that the service of moving cars from one point to another within the confines of an industrial plant, the cost of which should be borne as a part of the operating cost of the plant, is that of a plant facility and that part of such service which may be properly demanded of and furnished by the common carrier, is a part of the transportation service.

Crane Iron Wks. vs. C. R. R. Co. of N. J., 17 I. C. C. R. 514.

(1) **The Commerce Court on Plant Facilities.** In a case (18 I. C. C. R. 310) the Interstate Commerce Commission found that the service performed by a carrier in delivering cars on the siding of an industry located from

one-fifth of a mile to seven miles from the main track of the carrier, was the same service which the carrier performed and for which it was compensated by its general tariff charge when it delivered freight at its depot in the city of Los Angeles, or on its team tracks in such terminal. In a review of the case by the Commerce Court, the latter held the finding of the Commission so contrary to the admitted physical facts as to be wholly untenable, and that in the absence of statutory provision to the contrary, it was the right of the carrier to decline to perform this industrial track service, on a facility admittedly not a part of the carrier's terminal and a facility of the industrial plant. If the carrier voluntarily performed the service under an arrangement with the owner of the industrial plant and its plant facilities, the carrier had an unquestioned right under the statute to charge for such service. (Citing I. C. C. vs. Stickney, 215 U. S. 105.)

The Commerce Court suspended the order of the Commission.

Atchison, etc., R. Co., et al., vs. I. C. C. 188 Fed. Rep. 229.

In the General Electric Company case a network of interior switching tracks, constructed to meet the necessities of the business, were held to be a mere plant facility.

It was held that common carriers are under no duty to extend their transportation obligations with the extension of great industrial plants, and to accept and deliver cars within the enclosure over a network of interior switching tracks constructed as a plant facility to meet the needs of the industry.

In this case the industry did nothing within its plant enclosure which it could lawfully call upon the carriers to do for it, and therefore nothing for which it might law-

fully demand compensation. Under these circumstances, the obligation of the carriers involved only an acceptance and delivery of cars at some reasonably convenient point of interchange.

General Electric Company vs. N. Y. C. & H. R. R. R. Co., 14 I. C. C. Rep. 237, 239.
Solvay Process Co. vs. D. L. & W. R. R. Co., 14 I. C. C. Rep. 246.
Kaul Lumber Co. vs. C. of Ga. Ry. Co., 20 I. C. C. Rep. 450, 456.

A general investigation was conducted by the Commission in 1912 to determine the status of certain tap lines either as common carriers within the purview of the Act and thereby entitled to receive divisions of through rates or as plant facilities. The Commission generally denied the claims of the tap lines for recognition as common carriers subject to the Act, but the question of their legal status was appealed to the Supreme Court, which court, repudiated the test applied by the Commission.

See the decision of the Supreme Court in the Tap Line Cases, supra, quoted in full in Chap. IX, this volume, sec. 2, "Tap Lines and Industrial Railroads."

The status of industrial and plant railroads was considered by the Commission in the two Industrial Railway cases, having especial reference to industrial steel plants.

The ordinary plant consists usually of blast furnaces, steel mills, rolling mills, and other manufacturing departments. It covers from 25 to 125 or more acres of land, in many cases enclosed by fences and gates. One of the important problems that each plant must meet in its own way is the disposition of slag and other refuse that accumulate in large quantities from the operation of the furnaces and mills. A convenient dumping ground must be provided, and this, partially at least, is the explanation

of the location of the plant in practically every instance either on a river bank or lake shore, where the submerged lands may be filled up to the established harbor lines, or on or adjoining lowlands or gullies where the refuse may be conveniently dumped. In practically every instance plant rails and locomotives are provided as a means for disposing of these waste materials, and a surprising amount of low or submerged lands have in that way been brought up to grade and made available for the extension of the plants themselves or for use by other industries. Some of these made lands are of great value. The plants, however, have various other and still more important uses for rails and locomotives, such locomotives and systems of rails in and about an iron and steel plant becoming a necessary facility in the industry. The plant tracks ordinarily are used not only for the movement of cars between the rails of the line carriers and various points within the plant, but they are required for the prompt and economical movement of material between the various departments. In some cases they are operated as a bureau or department of the industrial company; but in the majority of instances they are operated by an incorporated railroad company owned by the industry. In many cases the industrial railroad performs only the interchange switching with the line carriers, while the industry, with other power, does the interwork switching itself and not through its plant railway company. In other instances the incorporated industrial railroad performs all the switching within the plant as well as the switching to and from the rails of the line carriers. In addition to the standard-gauge spur and switch tracks in and about these plants, all the larger iron and steel industries maintain a system of narrow-gauge tracks operated with their own power and confined exclusively to mill work. In all cases there

is a practical identity in the ownership of the plant railway and the plant.

In the case of some of the plants the industrial railroad company owns no physical property, but formally leases its right of way, tracks, and equipment from the industry by which it is itself owned; in other cases the industrial railroad company owns the equipment and leases the tracks and right of way from the industry; and in still other cases the right of way has been deeded to the industrial railroad company in fee, and equipment have been assigned to it.

At the majority of the iron and steel plants the rights of way of the line carriers adjoin the property line of the industry, and in such cases the interchange of cars with the plant can readily be performed by the line carrier by means of a short switch track. In a few cases only is the plant located at a distance from a line carrier; in such cases the industrial railroad usually extends its rails to the trunk line; and extraordinary financial results have accrued to the industry, in the way of divisions and allowances, as a consequence of such an arrangement. At a number of plants, the tracks of two trunk lines parallel and adjoin the property of the industry and each of them formerly extended its switch tracks to a junction with the plant tracks either just within or just outside the plant enclosure. When the plant tracks were taken over by the incorporated plant railroad, the tracks of the latter were extended around the plant except over the rails of the newly incorporated industrial railroad. The result is an apparent intermediate service by the industrial railroad between the plant and the line carrier, on the basis of which the plant railroad has exacted compensation, not from the industry, but out of the rate of the line carrier. In several instances the right of way of a trunk line originally ran directly through the plant enclosure, and when

the incorporated industrial railroad assumed the operation of the plant tracks, the trunk line tracks were removed and relocated at a point outside the plant enclosure. These arrangements were usually accomplished by an exchange of property, the trunk line deeding its old right of way to the industry, or to its plant railway, in return for a deed of its new right of way acquired for the purpose by the industry. While the ostensible purpose of these transactions was to give the industry more room for the location of its mills and buildings, often the real object, and in all cases the actual result, was to give the industry a better opportunity to interpose its plant railway between its plant and the trunk line, so that the industrial railroad could have an apparent basis for allowances. The cost of relocating the trunk line was usually included in the capital account of the industrial railroad.

It was held by the Commission that the service by line carriers in Official Classification territory beyond a reasonably convenient point of interchange, between their rails and the tracks of industries, is a shippers' service, a part of the industrial operations of the plant, and not a service of transportation; and that the performance of such services by the line carriers without charge, in addition to the rate, and the allowances paid by them therefor to industries, or their plant railways, for performing the service for themselves, amounted to unlawful rebates, in fact and in effect, and gave undue and unreasonable preferences and advantages to the industries so favored and worked undue and unreasonable prejudice and disadvantage to shippers in the same line of business who did not receive any such allowances or the benefit of any such services and that the delivery of a car by a line carrier upon the interchange track is a delivery to the industry itself.

Industrial Railways Case, 29 I. C. C. Rep. 212.
Second Industrial Rys. Case, 34 I. C. C. Rep. 596, 598.
Tap Line Case, (4th Supp. Rep.) 35 I. C. C. Rep. 485.
Tap Line Case, (3rd Supp. Rep.) 34 I. C. C. Rep. 116.
Tap Line Case, (2nd Supp. Rep.) 31 I. C. C. Rep. 490.
Tap Line Case, (1st Supp. Rep.) 23 I. C. C. Rep. 549.
Tap Line Case, 23 I. C. C. Rep. 277.
A. T. & S. F. Ry. Co. vs. K. C. Stock Yards Co., 33 I. C. C. Rep. 92, 98, 99.
Joint Rates with Birmingham So. R. R. Co., 32 I. C. C. Rep. 110, 111, 120.
N. Y. Dock Ry. vs. B. & O. R. R. Co., 32 I. C. C. Rep. 568, 573.
Decatur Nav. Co. vs. L. & N. R. R. Co., 31 I. C. C. Rep. 281, 284, 285.
In re Muncie & Western R. R. Co., 30 I. C. C. Rep. 434, 435.
Campbells Creek Coal Co. vs. A. A. R. R. Co., 29 I. C. C. Rep. 682.
Crane Iron Works Case vs. U. S., 209 Fed. 238.
U. S. vs. B. & O. R. R. Co., 231 U. S. 274.
I. C. C. vs. Diffenbaugh, 222 U. S. 42.
I. C. C. vs. Stickney, 215 U. S. 98.

The plant service is a private service. Its distinguishing characteristic is that it is performed in the interest of particular shippers, and that the facilities employed are not available or accessible to shippers generally. If the plant service is transportation or switching the tracks employed are not available to the shipping public. Usually the industry owning the tracks is the sole beneficiary. The service may be performed by a common carrier or other public agency, but the test is the character of the service rendered and not the agency performing it. The principal test of common carriage is whether there is a bona fide holding out coupled with the ability to carry for hire. And if the service in any instance is a plant service the trunk line carriers may not lawfully compensate the shipper itself or indirectly through its incorporated plant

railroad, for the use of its tracks or for switching the shippers' cars over them with its own motive power.

A. T. & S. F. Ry. Co. vs. Kansas City, Stock Yards Co., 33 I. C. C. Rep. 92, 99.
Crane Iron Works vs. C. R. R. Co. of N. J., 17 I. C. C. Rep. 514.
Second Industrial Railways Case, 34 I. C. C. Rep. 596, 600.
Crane Iron Works vs. U. S., 209 Fed. Rep. 238 (affirming 17 I. C. C. Rep. 514).
Cancellation of Joint Rates C. Z. & G. R. R., 27 I. C. C. Rep. 353.
General Electric Co. vs. N. Y. C. & H. R. R. R. Co., 14 I. C. C. Rep. 237.
Solvay Process Co. vs. D. L. & W. R. R. Co., 14 I. C. C. Rep. 246.

See also—

Tap Line Case, 234 U. S. 1.
U. S. vs. B. & O. R. Co., 231 U. S. 274.
I. C. C. vs. Diffenbaugh, 222 U. S. 42.
Mfgrs. Ry. Co. vs. St. L. I. M. & S. Ry. Co., 32 I. C. C. Rep. 100, 106.
Merchants Cotton Press & Storage Co. vs. I. C. R. R. Co., 17 I. C. C. Rep. 98.
Cattle Raisers Assn. vs. F. W. & D. C. Ry. Co., 7 I. C. C. Rep. 513.
I. C. C. vs. C. B. & Q. R. R. Co., 186 U. S. 320.
I. C. C. vs. Stickney, 215 U. S. 98.
Cotting vs. Godard, 183 U. S. 79.

(2) **Private Side Tracks.** A private side track is one that is outside the carrier's right of way, yard, and terminals, and of which the railroad does not own either the rails, ties, roadbed, or right of way, and to which the railroad has no right of use superior to the right of the shipper.

I. C. C. Confr. Rulings Bull. No. 6, Rulings Nos. 121, 79-A, and 222.

(3) Private Side Tracks Distinguished from Carrier's Terminal. The terminal plant of the carrier is that system of tracks and structures necessitated under the legal duty of the carrier, to receive and deliver shipments. Private side tracks are constructed to facilitate the receipt and delivery of carload freight at a particular warehouse, factory, elevator, or industry, and connect either with the main track or with the interchange track of the carrier. The terminal tracks of the carrier usually end at the switch connecting the private side track, and the carrier is under no legal obligation to perform service upon such side tracks without reasonable compensation therefor.

Industrial Railways Case, 29 I. C. C. Rep. 212, 226.

§ 10. Drayage and Cartage.

The Commission has several times ruled upon the question of drayage or cartage allowances made to shippers who, through no fault of their own, were compelled to dray shipments at their own expense in addition to the regular transportation charge. By Conference Ruling No. 25, the Commission (June 6, 1908) permitted carriers to refund such drayage charges. On November 22, 1909, the Commission modified its previous ruling by requiring that a shipper whose freight had been tendered to him by the carrier at a terminal delivery other than that designated in the bill of lading, or upon wrong delivery facilities at destination, should demand right delivery, and, in a case where the shipper without affording the carrier opportunity to correct a wrong delivery accepted the shipment at such wrong delivery point and drayed the contents of car to his factory, he was denied a refund of the drayage charges. This ruling effected the abrogation of Ruling No. 25.

I. C. C. Conf. Rulings Bull. No. 6, Ruling No. 234.

By its Conference Ruling No. 283 (May 10, 1910), the Commission forbade altogether any refund of drayage expense incurred by a shipper whether the fault of the carrier or not.

I. C. C. Conf. Rulings Bull. No. 6, Ruling No. 283.

In a ruling promulgated at the same time, the Commission declared it the duty of the carrier to make delivery in accordance with routing instructions, and where wrong delivery has been made, it is the duty of the carrier to make delivery at the terminal designated in the routing instructions either by switching or by carting. In case the carrier delivers to the designated terminal by wagon or dray it must employ for such service, facilities owned or contracted for by it, and may not make an allowance to the shipper for such service.

I. C. C. Conf. Rulings Bull. No. 6, Ruling No. 286-(d).

The rulings of the Commission set forth in Conference Rulings Nos. 283 and 286-(d) remained in effect until the decision rendered by the Commission in Sterling & Son Co. vs. N. C. R. R. Co. et al., 21 I. C. C. R. 451, June 22, 1911, when it authorized refund for drayage expense incurred through misrouting of a shipment. The initial carrier misrouted the shipment, and to obtain delivery called for in the bill of lading, the consignee drayed the shipment to its plant at its own expense. In modifying its former rulings, the Commission said:

"This case illustrates the hardship that would be imposed upon shippers in many instances, without fault upon their part and solely by reason of the carriers' default, if the shippers could not recover for actual damage by reason of the improper delivery of freight, for if a shipper could

make the necessary transfer only at his own expense, he might find in many cases that this alternative would be less costly than the delay in having his freight delivered by the carriers at the proper place or to be without it until he could compel them to complete the delivery to which he is entitled. On the other hand, the Commission is not without admonition in past practices of the danger of discrimination and defeat of established rates if the door be left open for indiscriminate adjustment of claims of this kind without the submission of the same to the Commission.

"Recognizing the injustice and inevitable hardship to innocent shippers if in proper cases they may not recover for actual damages sustained, as well as the opportunity for discrimination in the adjustment of damage claims of this nature, the Commission upon further consideration has reached the conclusion that the ends of justice require modification of its prior rulings in respect of claims of this character to the extent that where, as in this case, by default or misconduct of a carrier in failing or refusing to take appropriate routing steps to secure a specific delivery, lawful under the established tariffs and specified by the shipper in writing at the proper time, and without collusion or connivance on the part of the shipper, the consignee is put under the necessity of transferring his freight at the point of destination in completion of the delivery to which he is lawfully entitled under the tariffs and routing instructions, the shipper or consignee is entitled to recover of the carrier at fault damages in the sum of actual cost to him of such transfer, but not in excess of reasonable rates of charge therefor.

"Under the provisions of section 15 of the amended Act, the Commission is directed to limit and prescribe the amount that a carrier may pay a shipper for the perform-

ance by him of a part of the carrier's duty of service in connection with the transportation of his freight. As above indicated, the Commission does not sanction the adjustment of claims of the kind here under consideration without reference of the same to it. Carriers admitting the justice of claims of this sort may hereafter make application to the Commission for authority to pay the same; each application to admit responsibility for the misrouting and be supported by affidavit of the agent of the carrier cognizant of the facts relied upon to justify the payment, as well as of a responsible accounting officer of the carrier. Shippers may present such claims in the usual manner of presenting formal complaints. All claims of this kind now pending before, or that have been refused by, the Commission will be considered, or reconsidered, in accordance with this modified ruling."

W. C. Sterling & Son Co. vs. M. C. R. R. Co., et al., 21 I. C. C. R. 451, 453.

See also—

Concentration of Cotton at Alexandria, La., 34 I. C. C. Rep. 163, 164.
Trap or Ferry Car Service Charges, 34 I. C. C. Rep. 516, 524, 526.
Stone's Express vs. B. & M. R. R., 33 I. C. C. Rep. 638, 642.
U. S. Button Co. vs. C. R. I. & P. Ry. Co., 32 I. C. C. Rep. 149, 151.
Eastern Shore Development S. S. Co. vs. B. & O. R. R. Co., 32 I. C. C. Rep. 238, 240.
Switching at Galesburg, Ill., 31 I. C. C. Rep. 294, 296.
Onion Rates to New York, N. Y., 30 I. C. C. Rep. 528, 529.
In re Freight Bills, 29 I. C. C. Rep. 496, 497.
Maxey vs. B. & O. S. W. R. R. Co., 26 I. C. C. Rep. 506, 507.
Wilson Bros. vs. D. L. & W. R. R. Co., 25 I. C. C. Rep. 11, 12.
Cassassa vs. P. R. R. Co., 24 I. C. C. Rep. 629.

Crosby & Meyers vs. Goodrich Transit Co., 17 I. C. C. Rep. 175, 177.
Miller vs. I. C. R. R. Co., Unreported Op. A-82.
I. C. C. Confr. Rulings Bull. No. 6, Rulings Nos. 441, 383, 392, 235.

Cartage may be furnished by the delivering carrier as an accessorial service, and it may charge therefor as a distinct and separate terminal service, but such cartage presupposes delivery upon the team tracks of the carrier and is supplementary thereto.

Under the Act to Regulate Commerce prior to 1901, the carrier was not required to publish what free cartage or accessorial service it would furnish, nor what sums it would pay shippers for transportation service rendered by them to the carrier. It was held, however, that the Commission, by a general order, might require such practices and allowances to be published in the tariff of rates.

As the Act is now amended such matters must be published in tariff form.

Associated Jobbers of Los Angeles vs. A. T. & S. F. Ry. Co., 18 I. C. C. Rep. 310, 316.
Mitchell Coal & Coke Co. vs. P. R. R. Co., 230 U. S. 247.

See also—

St. Louis Terminal Case, 34 I. C. C. Rep. 453, 458.
Industrial Railways Case, 29 I. C. C. Rep. 212, 227.
I. C. C. Tariff Circular 18-A, Rule 10-A.

§ 11. The "Car-Spotting" Case.

In many of the investigations conducted by the Commission into the attempted increases in rates by the carriers, the matter of free transportation and accessorial services performed by the railroads has been considered. Notable instances of this nature occurred in the Five Per Cent and Western Rate Advance cases.

Such a service is that of "spotting cars," or the placing of cars upon industry spurs or private sidings, or upon the tracks of industrial plants, at convenient points for loading and unloading, including the movement of the car incident thereto over the track or tracks of the industry. While the matter of "car spotting" was referred to by the Commission in the Industrial Railways cases, it was separately investigated and passed upon by the Commission in "Car Spotting Charges." In the Industrial Railways Case the Commission, in speaking of "Car Spotting," had said:

"Under the common law, as construed in the practically unanimous decisions of the courts, a delivery of carload freight to a shipper having a private siding is made by shunting the car upon the switch, clear of the main tracks. All services upon the siding beyond that point, in placing the car for loading or unloading at a particular spot convenient to the shipper, are what may be called volunteered services in the sense that they are in addition to the main-line haul and in excess of any obligation of service by the carrier at common law. Nevertheless the custom of making deliveries at the warehouse or factory door on private sidings is one of long standing in this country, and under certain language in the Act it is possible that the carrier may be required, upon reasonable compensation, to do this spotting, as it is called. We find no authority, however, English or American, that holds or intimates that the line carrier, in connection with the main-line haul, is under an obligation to spot a car at the factory door on a private siding except upon reasonable compensation included in the rate itself or set up in the form of a special charge.

"These private side tracks or sidings, as they are more commonly called, are constructed to facilitate the receipt and delivery of carload freight. They either connect a particular warehouse, factory, or elevator with the main

line of the carrier, or, in the case of an industry having plant tracks of its own, they connect the main line of the carrier with a point of interchange with the plant tracks. Ordinarily the private siding is a short track to a coal or lumber yard, or to a factory, warehouse, or elevator adjoining the right of way of the line carrier and having a door or platform where the car may conveniently be loaded or unloaded. In England a car shunted by the carrier upon a siding is spotted by the industry, this being accomplished ordinarily by means of a winch and cable. But in this country, although it is often done with a pinch bar or other appliances, the heavy modern equipment makes it much more convenient to spot a car at a factory door with a locomotive, and the line carriers quite generally perform the service Although the practice is not absolutely uniform throughout the country, the spotting is customarily done without any charge in addition to the published rate. It is, however, a special and particular service of peculiarly direct value to the shipper in that it not only secures prompt delivery to him, but enables him to avoid the expense of cartage, which in many cases would be very substantial. Such a service when included in the rate gives the shipper a very obvious advantage over a shipper who at the same rate must accept and deliver his traffic on a public team track and cart it to and from his factory or place of business; and the shippers who labor under this disadvantage far outnumber the other class of shippers. Whether under such circumstances a special charge, in addition to the line rate, should be exacted for spotting a car on a private siding of the usual and ordinary kind—that is to say, one leading to an elevator or to a door or unloading platform of a factory or warehouse—is undoubtedly a question that should and necessarily must have most careful consideration. That, however, together with free

store-door delivery, ferry car, and other free services by which, at the cost of the carriers, the relatively few shippers of large traffic are relieved from the expense of cartage, is a question that can not appropriately be disposed of finally in this case; and the spotting of cars without charge at the doors of factories or warehouses on private side tracks has been referred to here in order that we may have the benefit of the contract of that service with the very much more extensive service performed by the line carriers without additional charge for the larger industries that have, and require in their industrial operations, a more or less extensive system of tracks in and about their plants. We get an even more significant view of the matter when we contrast the ordinary switching service, without charge in addition to the line rate, on a switching track leading to a door or loading platform at a factory or warehouse, with the allowances and divisions surrendered by the line carriers out of the same rates to other large industries having, as an industrial necessity, an intricate system of tracks within their plants which they operate directly with their own power or indirectly through an incorporated railroad company owned by the industry. Throughout the territory under consideration here, the same rate that is exacted for a public team-track delivery, with the cartage charge which it entails upon the shipper, will give another shipper the service of spotting the car at his warehouse on a siding, without attendant cartage expense; it will also purchase for an industry the service of spotting the car at any point within its plant, or entitle it to allowances for doing this for itself. The resulting inequality in the value of the service rendered, as between these different classes of shippers, is very striking; and the very great additional cost to the carrier in performing the plant service is equally apparent."

Industrial Railways Case, 29 I. C. C. Rep. 212, 225.

In the "Car Spotting" Case the Commission distinguished between the spotting of cars where that service was a part of the transportation service covered by the line-haul rate and where such service was an additional service, holding that the line-haul rate covers one placement of a car upon an industry track for loading or unloading, and an additional charge should be made for each additional placement of a car for that purpose as also for the movement of cars from place to place within the plant during the process of manufacture. In its report and findings, the Commission said:

"This proceeding involves the propriety and reasonableness of a proposed charge for placing cars upon industry spurs or private sidings, or upon the tracks of industrial plants, at convenient points for loading and unloading, and for the movement incident thereto over the track or tracks of the industry. This charge, which is called a spotting charge, is proposed by the principal railroads in Central Freight Association and trunk line territories and the New York, New Haven & Hartford Railroad in New England, by their individual tariffs filed with the Commission to become effective at different dates from April 20, 1914, to July 15, 1914, inclusive. The effective dates of the tariffs which were filed to become effective prior to July 1, 1914, were postponed to that date by the voluntary act of the carriers, and upon protests from many classes of shippers all the tariffs were subsequently suspended by the Commission. The respondents announce in the suspended tariffs that they were filed to comply with a suggestion of the Commission in the Industrial Railways Case, 29 I. C. C. 212. The proposed spotting charge is 5½ cents per ton, minimum $2 per car, and the service for which the charge is proposed is defined in the suspended tariffs as follows:

"'Spotting' service is the service beyond a reasonably convenient point of interchange between road haul or connecting carrier and industrial plant tracks, and includes:

"'(a) One placement of a loaded car which the road haul or connecting carrier has transported, or

"'(b) The taking out of a loaded car from a particular location in the plant for transportation by road haul or connecting carrier.

"'(c) The handling of the empty car in the reverse direction.'

"The industries to which the charge applies are divided into three lists. The first of these lists appears in the tariff of the Pennsylvania Railroad Company, which may be taken as typical, under the heading:

"'List of industries having "industrial plant tracks" connected with the tracks of these companies on which these companies performed spotting service in the past and on which they will, if desired, continue to perform such service on and after the effective date of this tariff at the charge provided herein.'

"The second list appears in the same tariff under the heading:

"'List of industries having "industrial plant tracks" connected with the tracks of these companies on which the industry has performed spotting service in the past. The charge of these companies for performing spotting service for the industry on its plant tracks connecting directly with the tracks of these companies will be as per this tariff, provided the performance of this service by these companies is shown to be practicable and is agreed upon.'

"The third list appears under the following heading:

"'List of industrial railways (incorporated). These companies will perform "spotting" service on or over the tracks of these railways only by special agreement.'

"Some of the suspended tariffs do not contain the third list.

"The basis of selection of industries, if there may be said to have been any such basis, varied with the different respondents. The necessity for an intraplant service in addition to the movement of cars incident to the receipt and delivery of carload freight seems to have been controlling in some cases, but in general the industries were arbitrarily selected, and range from the ordinary mill or factory with a single spur or private siding to the large iron and steel industries having an interior system of rails called a plant railway.

"Considerable testimony was presented by both respondents and protestants with reference to the physical layout of the tracks over which the service is performed, the character and extent of that service, and the approximate cost thereof.

"It does not appear that the terminal facilities of the respondents, exclusive of industry spurs, private sidings, and tracks of industrial plants, are now adequate for the receipt and delivery of all carload freight which they have been accustomed to receive and deliver upon such tracks at convenient points for loading and unloading, and respondents do not show that they could provide such terminal facilities, but some of the protestants testified that if such terminal facilities were provided by the carriers they would not use them.

"It is admitted by the principal respondents that the proposed charge and also the lists of industries named in the tariffs are tentative merely, and that if the tariffs should take effect as filed unjust discrimination would result in that there are many industries not named in the suspended tariffs for which the respondents perform without an additional charge therefor the same service for

which they propose to require the industries named in the suspended tariffs to pay the spotting charge in question. But while these respondents concede that the proposed tariffs can not be justified, they ask us to indicate how far they may go in imposing spotting charges.

"One of the respondents, the Chesapeake & Ohio Railway Company of Indiana, insists that its proposed charge is justified by the mere fact that the industries upon which it proposes to impose the charge are located upon a private track which it does not own or control, and which is not a part of its terminal facilities. This respondent concedes that the line-haul rate covers the transportation to and from the point of connection of its tracks with the track on which the industries are located and which it claims to be a private track, but it insists that it has no right to perform any service over a private track without making a charge therefor in addition to the line-haul rate, and that it not only may but must add to the line-haul rate a reasonable charge for the switching of cars between the industries in question and point of connection of its tracks with the track on which the industries are located.

"The protestants insist not only that the proposed tariffs can not be justified, but that the line-haul rates cover the placement of cars upon industry tracks at convenient points for loading and unloading without regard to the size of the plant or the ownership or control of the tracks over which the cars are moved, and that no charge for the spotting service in addition to the line-haul rate could be justified.

"It has long been the custom of carriers in this country to receive and deliver carload freight upon spur tracks leading to private industries at convenient points for loading and unloading without imposing any charge for that service in addition to the line-haul rate, and in the Los

Angeles case, 18 I. C. C. 310, we held that where this service is merely a substitute for team-track receipt and delivery of carload freight the line-haul rate covers the service for the reason that rates generally in this country have been constructed upon that basis. Our order in that case was upheld by the Supreme Court. Los Angeles case, 234 U. S. 294. The mere size or complexity of the industry is not controlling in determining whether or not the line-haul rate covers the receipt or delivery of freight at the door of the plant. The service involved in the placement of cars for loading or unloading at an isolated industry to which a single spur leads may be as great as that rendered in the placement of cars for loading or unloading in a large plant having an intricate system of interior tracks. Indeed, there is a testimony tending to show that by reason of greater density of traffic and greater tonnage the cost of spotting at the larger industries is less per car than at the smaller industries. At the large industries the trunk line may render interplant services in the movement of cars from place to place within the plant during the process of manufacture which it has no occasion to render at smaller industries, and for such services an additional charge should be made; but where the service rendered is merely a substitute for the service which would be required if the movement were to or from a team track, an industry spur, or a private siding, nothing should be added to the charge for the line haul.

"As existing rates must be deemed to have been constructed to cover the customary placement of cars at factory doors, whether upon an industry spur or private siding, or upon the tracks of an industrial plant, and the outward movement of cars from such tracks, without regard to the size or nature of the plant, to now add a charge

to the line-haul rate for that service would be revolutionary.

"While we have from time to time called the attention of the carriers to the possibility of increased revenues from certain sources, and have suggested that it might be that the carriers ought to make a charge in addition to the line-haul rate for some services in connection with the movement of cars within industrial plants, for which no such additional charge is now made, we have never intended to suggest that an additional charge would be proper for services which by long continued general custom and usage have been treated as covered by the line-haul rate.

"In General Electric Co. v. N. Y. C. & H. R. R. R. Co., 14 I. C. C. 237, we stated that common carriers could not be called upon as a part of their contract of transportation to make deliveries through a network of interior switching tracks constructed as plant facilities to meet the necessities of the industry, but the case did not require a decision of that question. The point actually decided was that the complainant was not entitled to an allowance from the carrier for a service which the carrier was ready and willing to perform, and which the complainant performed because it was not convenient for it to permit the carrier to perform the service. In that case the Commission said (p. 244):

" 'The complainant is not entitled to compensation as demanded by it in the complaint or on any other ground developed upon the record. It assumed charge of the work of switching cars between its storage tracks and various points within the inclosure of its plant, not because the defendants refused longer to spot cars for it or because they did not give the complainant a reasonably good service in that respect, but simply because the growth of its business to vast proportions, the multiplication of its

buildings, and the extension of switching arrangements within the inclosure required the complainant to take charge of the interior switching for itself and to exclude the defendants from its plant. And it now demands compensation for doing that which it claims the defendants are under the obligation to do, but which it does not and could not permit them to do. On that ground alone the complaint is without merit. Relief against a defendant must ordinarily be predicated upon his failure or refusal to do what he is legally bound to do and not upon the fact that the complainant has volunteered to do it for him.'

"As said by the Supreme Court in Atchison Railway Co. v. United States, 232 U. S. 199, 214, whatever transportation service or facility the law requires the carriers to supply they have the right to furnish, and it does not follow, therefore, that because the line-haul rate covers the movement of cars incident to the receipt and delivery of carload freight on industry spurs, or on the interior tracks of industrial plants, that the owner of the property transported may in every case receive an allowance from the carrier when he performs that service.

"In Industrial Railways case, 29 I. C. C. 212, the Commission also expressed the opinion that the line-haul rate does not cover the movement of cars incident to the receipt and delivery of carload freight at large industrial plants where the movement is through a network of interior tracks, but in that case also the question presented was one of allowances, and we did not undertake to determine the number of tracks over which the cars must move prior to their receipt or delivery by the carrier in order to deprive the owner of the property transported of the right to an allowance for the service. We did, however, in that case recognize the fact that the line-haul rate may

cover the service of spotting a car at the factory door on a private siding, as we there said (pp. 225-226):

" 'Under the common law as construed in the practically unanimous decisions of the courts, a delivery of carload freight to a shipper having a private siding is made by shunting the car upon the switch, clear of the main tracks. All services upon the siding beyond that point, in placing the car for loading or unloading at a particular spot convenient to the shipper, are what may be called volunteered services in the sense that they are in addition to the main-line haul and in excess of any obligation of service by the carrier at common law. Nevertheless the custom of making deliveries at the warehouse or factory door on private sidings is one of long standing in this country, and under certain language in the act it is possible that the carriers may be required, upon reasonable compensation, to do this spotting as it is called. We find no authority, however, English or American, that holds or intimates that the line carrier, in connection with the main-line haul, is under any obligation to spot a car at the factory door on a private siding except upon reasonable compensation included in the rate itself or set up in the form of a special charge.'

"There may be cases in which the spots at which cars are placed for loading and unloading in complex industries are so located that the request for the receipt and delivery of carload freight at such spots could not, in view of general usage, be regarded as reasonable, and where a change for the spotting service in addition to the line-haul rate might therefore be justified, but the mere fact that an industry is complex, or that it requires an interplant service in addition to the receipt and delivery of carload freight, is not sufficient to justify an additional charge for the placing of cars at the door of the industrial plant for

the receipt or delivery of carload freight. The line-haul rate, however, covers only one placement of the car for loading or unloading, and an additional charge should be made for each additional placement of the car for that purpose.

"The mere fact that many individual plants are operated together as a single industry does not deprive the industry of the right to such a service in the receipt and delivery of carload freight at each of the several plants as that plant would be entitled to have if it were operated separately, unless the collective operation so far removes the necessity for such a service as to make it unreasonable for the industry to demand the service.

"To permit the carriers to add to the line-haul rate a charge for the movement of cars incident to the receipt and delivery of carload freight at industries selected because of their size or complexity, or upon some other basis equally uncertain, while treating a like service at all other industries as covered by the line-haul rate, would result in unjust discrimination of a flagrant character.

"The argument that while the line-haul rate may cover the movement incident to the receipt and delivery of carload freight when that movement is over an ordinary industry spur, it does not cover a like service when the movement is over the interior tracks of an industrial plant, is founded upon the assumption that the carrier and the industry have the joint use of the industry spur while the interior tracks of the industrial plant are used exclusively by the industry. The fact is, however, that the service which the carrier renders in the movement of cars over the interior tracks of the industrial plant for the purpose of receiving and delivering carload freight of the industry, is a public service, and the tracks are used both for that public service and for the private purposes of the industry.

It is immaterial that the carrier may not use the tracks for all the purposes for which it uses the ordinary industry spur. The difference is merely one of degree and not of kind.

"Especially ought the tracks of the industrial plant, to the extent that they are used by the carrier for a public service, be treated as a part of its terminal facilities, where the carrier does not show that it would be possible for it to provide the necessary terminal facilities in any other way.

"The public interest is served in many ways by permitting the carriers to use the tracks of industrial plants as a part of their terminal facilities. The exclusively owned terminals of the carriers are thereby relieved of a heavy burden under which they would either break down completely or be so congested as to greatly inconvenience shippers who are compelled to receive and deliver their freight in those terminals. The distribution of terminals also tends to prevent the undue concentration of industries and consequent concentration of population, thus aiding the solution of one of our social problems.

"The proposed spotting charge of the Chesapeake & Ohio Railway Company of Indiana requires separate consideration. The industries to which it is proposed to apply this charge are located on the tracks of the Muncie & Western Railroad at Muncie, Ind. In In re Muncie & Western R. R. Co., 30 I. C. C. 434, we held this road to be a mere plant facility of the principal industry located thereon, and not entitled to a division of joint rates with the trunk lines. That case is now pending on a petition for rehearing, by which we are asked to reconsider that finding.

"There are only two industries on the Muncie & Western, and these industries are served by two belt lines in

addition to the Muncie & Western. The principal one of these two industries has a large plant, and the three lines referred to serve different parts of the plant. When the movement is over either of the two belt lines the Chesapeake & Ohio of Indiana absorbs the switching charge of that line and gives the shipper the Muncie rate, but it now proposes to add to that rate a minimum charge of $2 per car when the shipment moves over the Muncie & Western. If the Muncie & Western is a mere plant facility, the line-haul rate of the Chesapeake & Ohio of Indiana to and from Muncie covers the movement of cars incident to the receipt and delivery of freight on that track. If that road is a common carrier, the addition to the line-haul rate of a charge for the switching of cars over that road to and from industries located thereon would create an unjust discrimination so long as the trunk line absorbs the switching charges of other roads which serve the same industries, as it now does, the service in each case being substantially the same. The only reason which the Chesapeake & Ohio of Indiana gives for imposing the proposed charge for the switching of cars over the Muncie & Western Railroad to and from the industries thereon, while it absorbs the switching charges of other roads which serve the same industries, is that such other roads are common carriers, while the Muncie & Western Railroad, as the Chesapeake & Ohio of Indiana claims, is only a plant facility. It is unnecessary, therefore, in this proceeding to determine whether the Muncie & Western is or is not a common carrier, as in either case the proposed spotting charge has not been justified.

"With the growth of terminal areas and the consequent increase of terminal expenses, there may be a growing need for a separation of the charges for line hauls from the charges for terminal services, and a graduation of

charges for terminal services so that each industry within the terminal area will pay in proportion to the service it receives in addition to the line-haul, if such a system should in the future be deemed to be preferable to what now obtains; but before that could be done there would have to be a separation of the cost of the line haul from the cost of the terminal service, and a complete reconstruction of rates.

"We conclude, therefore, and find that the respondents have not justified the suspended tariffs, and an order will be entered requiring those tariffs to be cancelled. The respondents may, however, file new tariffs providing for spotting charges in those instances in which the terminal services performed exceed the services which under established custom is, or should be, performed for the line-haul rate, in accordance with the views expressed in this report."

Car Spotting Charges, 34 I. C. C. Rep. 609, 613.
Industrial Railways Case, 29 I. C. C. Rep. 212, 225.
Second Industrial Railways Case, 34 I. C. C. Rep. 596.

CHAPTER VI.

CAR PER DIEM CHARGES.

§ 1. Car Per Diem Charges Defined.
§ 2. Compensation by Carriers for Use of Foreign Equipment Required by Act to Regulate Commerce.
§ 3. Fluctuations in Per Diem Charge.
§ 4. The Per Diem Charge a Rental.
§ 5. Per Diem Charge Compared with Mileage Rental.

CHAPTER VI.

CAR PER DIEM CHARGES.

§ 1. Car Per Diem Charges Defined.

Among the proposed remedies for car shortage which were suggested by the Interstate Commerce Commission in its exhaustive investigation in the Matter of Car Shortage and Other Insufficient Transportation Facilities, was an increased car per diem charge designed to induce reasonably prompt return of equipment off line. A plan was also suggested to the Commission, of a car clearing house, which contemplated a free interchange of cars between railroads and an arbitrary control of all equipment in its interchange and distribution. Speaking of the effect upon this plan of car per diem charges, the Commission said:

"In connection with the question last treated (proposed car clearing house) it is to be noted, and that with some emphasis, that one of the problems which the railroad that desires to deal honestly by the public has to meet is the dishonesty of its fellow-carriers. 'Car appropriation' between carriers does not seem to be regarded as dishonorable nor even looked upon with great disfavor.

"It is not many years since the railroad which originated freight, transferred it at its junctions to the cars of the connecting road. Each railroad was thus made to supply its own equipment. This was an uneconomical and time-wasting method, and so out of their own necessities and

to give a prompter service the railroads developed the practice which generally obtains today of permitting cars to pass onto the tracks of their connecting roads and making a per diem charge therefor. Under this system the present method of hauling freight over several connecting lines has made possible that great body of through transportation which is perhaps the most distinctive feature of American railroading. Experience has proved, however, that the rules governing the return of cars were evaded to such an extent that not a few railroads relied upon foreign equipment for their own needs.

"While the railroads may fix the price that shall be charged for the use of their cars by other roads, it may become advisable for the protection of those roads which, realizing their duties as common carriers, furnish themselves with adequate equipment, that power be vested in this Commission to make rules governing the interchange of cars and that Congress also enact a penal law under which railroads may be punished for confiscation of foreign equipment. It is submitted that the carriers themselves can not deal with this problem by raising the per diem charge without seriously limiting the extent and utility of through transportation, a contingency that would demoralize the business of the country. That this matter of securing the return of cars to their owners is not one to be regarded indifferently is made evident by the fact that railroads having 10 per cent of the total mileage in one of the states rely 'entirely' for equipment upon foreign cars."

In the Matter of Car Shortage and Other Insufficient Transportation Facilities, 12 I. C. C. R. 561, 572.

The plan of paying for borrowed equipment by the mile had been in force ever since cars began to be sent

from one railroad to another. This method, however, led to serious abuses. The owner of the car was powerless either to get his car returned or to test the accuracy of the records by which he was paid for its use, so that cars were often kept out of his possession for months, being used by consignees as free storehouses for freight, or by the borrowing railroad company in local service at an unreasonably low rental, or as has occurred in consequence of errors in the accounts, without any rental at all.

This state of affairs led the American Railway Association early in the year 1902, to inaugurate a system by which the interchange of freight cars between the different railroads of the country was put on a business basis, a change which appears to be a definite reform and in the interest of efficient service and upright dealing between carriers.

The reform consisted in the adoption of a rule to pay by the day instead of by the mile. The owner can himself keep account of the number of days a car is absent from the home line—thus insuring accuracy; while the fact that a borrowed car must be paid for at the same rate when standing idle as when used in profitable service, spurs the borrower to promptly return it when it has completed the service for which it was borrowed. The older method put a premium on dilatory return, while the new plan set a premium on prompt return.

The interchange of cars is now almost unrestricted throughout the United States; every road is a constant borrower from and lender to, not only its immediate connections, but from and to lines in distant states.

The owners of the cars are apprised of their various movements and whereabouts by a system of reports rendered by the car accountant or superintendent of car service of the various roads over which the cars move.

I. C. C. Ann. Rep. 1902.

§ 2. Compensation by Carriers for Use of Foreign Equipment Required by Act to Regulate Commerce.

The Act to Regulate Commerce requires the carriers subject thereto to "establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein, and for the operation of such through routes, and provid ing for reasonable compensation to those entitled thereto."

Act to Reg. Com., sec. 1, par. 2.

§ 3. Fluctuations in Per Diem Charge.

Prior to January, 1907, the practice among the carriers had been to charge a per diem of 20 cents per car, but as a result of the agitation occasioned by the disastrous car shortage of that fall and winter, over one hundred of the railroad companies in the country raised the per diem to 50 cents per car, believing the former charge of 20 cents per car per day an insufficient penalty to insure prompt return of off line cars.

In the Matter of Car Shortage and Other Insufficient Transportation Facilities, 12 I. C. C. R. 561, 573.

Compare—

Michie vs. N. Y. N. H. & H. R. R. Co., 151 Fed. Rep. 694, where an additional penalty was imposed by a carrier for the detention of its cars off line beyond a fixed period during which the usual per diem was being paid.

In 1908, however, the car per diem charge was uniformly fixed at 25 cents per car.

N. Y. Hay Exchg. Assn. vs. P. R. R. Co., 14 I. C. C. R. 178, 184.

Subsequently the per diem charge of box, stock, flat and coal cars was advanced to 35 cents per car per day, and still later to 45 cents per day.

Boise Lumber Co., Ltd., vs. P. & I. N. Ry. Co., 33 I. C. C. Rep. 109, 112.
Spiegle vs. So. Ry. Co., 25 I. C. C. Rep. 71, 75.

The car rental basis for refrigerator cars is ¾ cents per mile.

Hume Co. vs. S. P. Co., 33 I. C. C. Rep. 126, 127.

See also—this chapter, sect. 5, "Per Diem Charge Compared with Mileage Rental."

§ 4. The Per Diem Charge a Rental.

While a per diem charge for the detention of equipment off line must, of necessity, have the effect of a penalty, the intent and purpose of which is to induce a more prompt return of the equipment, it is better regarded as a rental charge for the use of the detained car off line, although a charge of 20, 25 or 50 cents per car per day falls far short of the general conception of the rental value of a freight car for a day.

All railroads are borrowers and lenders of cars under the present system of interchange which is in vogue between connecting lines, and theoretically it is hardly credible that the lender should furnish the borrower with equipment for much less than a fair compensation.

Kehoe & Co. vs. C. & W. C. R. R. Co., 11 I. C. C. R. 166.

See also—

Michie vs. N. Y. N. H. & H. R. R. Co., 151 Fed. Rep. 694, holdinig a per diem charge a rental charge for the use of the car.

It calls for some stretch of the imagination to reconcile these holdings with the actual amount paid through these per diem charges, as anything like a fair rental compensation for the use of the car.

In Thompson Lumber Co. vs. I. C. R. R. Co., 13 I. C. C. R. 657, 661, the defendant carriers advanced the claim, which was in no wise controverted, that a freight car is worth to the carriers about $2.50 per day, although the demurrage charge is usually only $1 per day and the car rental or per diem but about one-half that amount.

§ 5. Per Diem Charge Compared with Mileage Rental.

The carriers pay for the use of tank cars a rental of ¾ of a cent per mile, which is assessed upon the empty as well as the loaded movements. Tank cars, in some kinds of traffic, such as cotton-seed oil, which calls for an expedited service, average approximately 83 miles a day, and, therefore, cost the carrier 63 cents a day in mileage, while other cars average 21 miles per day and cost them a per diem of 25 cents.

Re Demurrage Charges on Tank Cars, 13 I. C. C. R. 378, 381.
Memphis Cotton Oil Co., et al., vs. I. C. R. R. Co., et al., 17 I. C. C. R. 313, 319.

Some carriers incur an expense incidental to the handling and transportation of vegetables, fruits and dairy products of ¾ of a cent per mile for all mileage, loaded or empty, of refrigerator cars while on their rails. On a haul, for instance, via the Atlantic Coast Line Railway, from St. Andrews, S. C., to New York City, and return, this rental on a refrigerator car amounts to as much as $12 per car.

See—

Voorhees vs. A. C. L. R. Co., 16 I. C. C. R. 45, 47.
Nebraska-Iowa Grain Co. vs. U. P. R. R. Co., 15 I. C. C. R. 90, 97.

CHAPTER VII.

TERMINAL FACILITIES.

§ 1. General Meaning.
§ 2. Facilities May Vary with Traffic Importance of Terminal Points.
§ 3. Regulations for Safety of Terminals.
§ 4. Differences in Terminal Facilities.
§ 5. Jurisdiction of Interstate Commerce Commission over Terminal Facilities.
§ 6. Individual Rulings on Terminal Station Facilities.
§ 7. Term "Facility" Includes Reciprocal Trackage Rights.
§ 8. Carriers Not Required to Give Use of Terminals to Competitors.

CHAPTER VII.

TERMINAL FACILITIES.

§ 1. General Meaning.

Under detailed subjects of service, terminal services and facilities have been heretofore considered from the standpoint of the carrier providing all services necessary to the proper receipt and delivery of property in transportation. Thus, the prior sections dealt with the service rather than the facility or instrumentality by which the service was accomplished.

The present structure of the amended first section of the Act to Regulate Commerce, in so far as it defines the transportation required of the carrier to include all instrumentalities and facilities of shipment or carriage, and all services in connection with the receipt, delivery and handling of property transported, is inclusive of both the facility provided and the service performed through such facility. Nor may the carrier fail to furnish such transportation, or, therefore, the facility, upon reasonable request therefor, or establish unjust or unreasonable charges for the use thereof.

Act to Reg. Com., sec. 1, par. 2.

This provision is in no way an enlargement of the common law duty of the carrier to provide such facilities as

are necessary to the safe and prompt movement of traffic which it undertakes to transport. If we examine a large terminal like Chicago, or New York, where not only a tremendous tonnage begins and ends its transportation movement, but an even greater tonnage passes through such terminal, we will find many facilities there established and maintained by the carriers which they are not required, under the common law or the Act to Regulate Commerce, to provide. Such, for instance, as gravity yards, classification yards, storage yards, storage houses, elaborate inbound and outbound freight houses, elevators, loading and unloading machinery, cranes, derricks, fruit sheds, hay sheds, special platforms, etc. Such facilities have been provided as a part of the business policy of the carriers, to facilitate and encourage the enlargement of their business. Some latitude must be accorded the carrier to make its service attractive. The only restriction of this policy lies in the prohibition of the Act to Regulate Commerce, that the carrier shall not accord undue preferences or practice unjust discriminations. Otherwise, we should find all terminal facilities maintained under and measuring up to an inflexible standard, which, while meeting the demands and necessities of one situation, might be entirely in excess of the needs of another terminal situation, and yet again utterly inadequate to meet the requirement of a still differently circumstanced locality. So, the futility of anything like a standard of terminal facilities is apparent.

This was obvious to Congress when it amended the statute, and that it took notice of the fact is apparent from the mere reading of the first section:

"And it is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe and enforce just and reasonable * * * regulations and

practices affecting * * * the receiving, handling, transporting, storing and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable * * * regulation and practice with reference to commerce between the states and with foreign countries is prohibited and declared to be unlawful."

Act to Reg. Com., sec. 1, par. 4.

It is obviously the duty of the carriers subject to the Act to provide adequate terminal facilities, and the public interest is served in many ways by permitting carriers to use tracks of industrial plants as part of their terminal facilities.

Terminal properties must be treated as all other parts of the property of a common carrier. Such properties are not preempted domain, against which the public can assert no rights and upon which it can impose no duties. The whole theory of regulation rests not upon an assumption of private property, but of private property devoted to a public use, and property which is devoted to a public use is to that extent not private, but quasi-public. If the terminal properties of carriers are, as a matter of fact, private to such an extent that their owners may absolutely refuse access to them and use them unless any terms which they may see fit to dictate are met, should not their value be deducted from the gross value of the carrier's property in order to arrive at that "fair value" upon which every carrier is entitled to earn a reasonable rate of return?

Thus, it is the obvious duty of the carriers to provide adequate terminal facilities to enable them to perform

within the requirements of the Act the transportation service they are lawfully called upon to render.

Lighterage Storage Regulations at New York, 35 I. C. C. Rep. 47, 53, 57.
Car Spotting Charges, 34 I. C. C. Rep. 609, 619.
St. Louis Terminal Case, 34 I. C. C. Rep. 453, 455.
Trap or Ferry Car Service Charges, 34 I. C. C. Rep. 516, 546.
City of Nashville vs. L. & N. R. R. Co., 33 I. C. C. Rep. 76, 78, 80, 85.
In re Financial Relations etc., L. & N. R. R. Co., 33 I. C. C. Rep. 168, 200, 201, 202, 213.
Iowa & S. W. Ry. Co. vs. C. B. & Q. R. R. Co., 32 I. C. C. Rep. 172, 175.
N. Y. Dock Ry. vs. B. & O. R. R. Co., 32 I. C. C. Rep. 568, 571, 573.
Illinois Coal Cases, 32 I. C. C. Rep. 659, 680.
Colonial Salt Co. vs. C. B. & Q. R. R. Co., 31 I. C. C. Rep. 559, 562.
B. A. & A. R. R. Co. vs. B. & S. R. R. Corp., 31 I. C. C. Rep. 583, 585.
Merchants and Mfgrs. Assn. vs. B. & O. R. R. Co., 30 I. C. C. Rep. 388, 390.
Switching at Arcade, N. Y., 30 I. C. C. Rep. 501, 503.
Richmond Chamber of Commerce vs. S. A. L. Ry. Co., 30 I. C. C. Rep. 552, 556.
People's Fuel & Supply Co. vs. G. T. W. Ry. Co., 30 I. C. C. Rep. 657, 661.
Mfgrs. Ry. Co. vs. St. L. I. M. & S. Ry. Co., 28 I. C. C. Rep. 93, 101.
New England Investigation, 27 I. C. C. Rep. 560, 608.
St. L. S. & P. R. R. vs. P. & P. U. Ry. Co., 26 I. C. C. Rep. 226, 236, 237.
Galveston Commercial Assn. vs. A. T. & S. F. Ry. Co., 25 I. C. C. Rep 216. 228.
S. W. Produce Distributers vs. Wabash R. R. Co., 20 I. C. C. Rep. 458, 461.
Peale, Peacock & Kerr vs. C. R. R. Co. of N. J., 18 I. C. C. Rep. 25, 33.
Barrett Mfg. Co. vs. C. R. R. Co. of N. J., 17 I. C. C. Rep. 464, 466.
Wilson Produce Company vs. P. R. R. Co., 14 I. C. C. Rep. 170, 174.
S. P. Terminal Co. vs. I. C. C. 219, U. S. 498, 521.

Eichenberg vs. S. P. Co., 14 I. C. C. Rep. 250 (affirmed in 219 U. S. 498, 521).

§ 2. Facilities May Vary with Traffic Importance of Terminal Points.

The federal courts have held it not to be the intention of the Act to require that exactly the same accommodation should be made for freight traffic at every station on the carrier's line. Certain special facilities may be afforded a large and important city, and not provided at less important points, although they make the handling of the traffic more convenient and less expensive than at smaller places.

Michie vs. N. Y. N. H. & H. R. R. Co., 151 Fed. Rep. 694.
D. G. H. & M. R. R. Co. vs. I. C. C., 74 Fed. Rep. 803.

See also—This chapter, sect. 4, "Differences in Terminal Facilities."

§ 3. Regulations for Safety of Terminals.

It is unquestionably a carrier's right and duty to take all needful precautions to insure the safety of its terminals and the traffic passing through the same.

Preston & Davis vs. D. L. & W. R. R. Co., 12 I. C. C. R. 114, 119.

§ 4. Differences in Terminal Facilities.

A common carrier of interstate commerce is not in every case under legal compulsion to furnish the same terminal facilities for all descriptions of traffic. It is sufficient if reasonable provision is made in that regard, and what is reasonable in a given instance depends largely upon the conditions and surroundings of the particular locality.

Palmer Dock Hay & Produce Bd. of Trade vs. P. R. R. Co., 9 I. C. C. R. 61.

It is the duty of carriers to make reasonable effort to provide adequate terminal and other facilities. The reasonableness of the effort must be measured by the circumstances and conditions affecting the undertaking. The principle laid down by the Commission in Galveston Commercial Asso. vs. A. T. & S. F. Ry. Co., 25 I. C. C. 216, 228, was subject to these qualifications. In that case it appeared that the carriers had abundant opportunity for the extension of their facilities of which they had not availed themselves.

Thus the general rule would apply to terminals, that while it is the duty of carriers to foster commerce by rendering efficient transportation service, it is unlawful for them to foster it more at one place than at another, and they are under no obligation to foster commerce at the sacrifice of reasonable profits.

§ 5. Jurisdiction of Interstate Commerce Commission Over Terminal Facilities.

The obligation to provide station facilities at a given point along the line of a railroad may arise under the terms of the charter of a company or may be imposed by statute, and some authorities assert that the duty exists also at common law; but the Commission is not the proper forum to which to appeal for the enforcement either of a charter, statutory or common-law obligation, as it has no authority to issue a writ of mandamus, and possesses no common law jurisdiction. The contention that the Commission has power, under the Act to Regulate Commerce, as amended June 29, 1906, to require a common carrier to locate or re-locate and maintain a station at a given point is open to doubt, but it is manifest that the Commission should not exercise such power unless all the facts and conditions clearly indicate that the interests of the general public in

the locality involved are materially impaired by the lack of such facilities.

Jones vs. St. L. & S. F. R. Co., 12 I. C. C. R. 144.
Eddleman vs. M. V. R. Co., 13 I. C. C. R. 103
Snook vs. C. R. R. Co. of N. J., 17 I. C. C. R. 375.

To a certain extent the public stations, depots and grounds of carriers are their private property, subject to their own control with respect to any private business carried on, in or upon them, provided that what is thus done for the public is in itself a reasonable use of the property, and contributes to the public convenience or to the advantage of the carrier.

Under the more recent decisions of the Commission, giving effect to the evident scope of the regulatory laws under which the Commission requires the carriers to provide adequate terminal facilities, it would seem that the authority of the Commission is sufficient to compel the carriers to remedy the inadequacy of terminals, even to the extent of requiring new terminal structures and dictating their location.

S. W. Produce Distributers vs. Wabash R. R. Co., 20 I. C. C. Rep. 458, 461.

See also citations of cases to sect. 1, of this chapter.

§ 6. Individual Rulings on Terminal Station Facilities.

In the absence of discrimination, the Commission has declined to require a carrier to furnish a car shed under which vegetables could be loaded without damage from the weather.

Ponchatoula Farmers' Assn., Ltd., vs. I. C. R. R. Co., 19 I. C. C. R. 513, 515.

The Commission has held it not to be a violation of the Act to Regulate Commerce, for a carrier to grant to an auction company exclusive warehouse facilities.

So. Western Produce Distributers vs. Wab. R. R. Co., 20 I. C. C. R. 458.

A receiving station operated under agreement with the carrier by a competing shipper, is not a reasonable facility to offer another shipper.

Federal Sugar Refining Co. vs. B. & O. R. R. Co., 20 I. C. C. R. 200, 211.

These rulings, however, must not be understood to conflict with the general requirement that carriers must provide adequate terminal facilities for the proper performance of their transportation service.

§ 7. Term "Facility" Includes Reciprocal Trackage Rights.

The Commission held in the Nashville case that the term "facility," as used in section 3 of the Act, includes reciprocal trackage rights over terminal tracks, the consequences and advantages to shippers being identical with those accruing from reciprocal switching arrangements.

City of Nashville, Tenn., vs. L. & N. R. R. Co., 33 I. C. C. Rep. 76, 85.

Traffic Bureau of Nashville, Tenn., vs. L. & N. R. R. Co., 28 I. C. C. Rep. 533 (affirmed in L. & N. R. R. Co. vs. U. S., 216 Fed. Rep. 672).

§ 8. Carriers Not Required to Give Use of Terminals to Competitors.

Section 3 of the Act to Regulate Commerce requires every common carrier subject to the provisions of the Act to accord all reasonable, proper and equal facilities for the

interchange of traffic between their respective lines, but "this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another authority to require one railroad to give the use of its terminal facilities to another." But the provision of section 3 does not give a terminal carrier the right to accord to one carrier an interchange of traffic or the use of a part of its terminal facilities and deny such privilege or use to another. If the carriers are voluntarily allowing such use of their tracks or terminal facilities, the proviso of section 3 can have no application.

City of Nashville vs. L. & N. R. R. Co., 33 I. C. C. Rep. 76, 85.
Switching at Galesburg, Ill., 31 I. C. C. Rep. 294.
B. R. & P. Ry. Co. vs. Pa. Co., 29 I. C. C. Rep. 114.
Traffic Bu., etc., vs. L. & N. R. R. Co., 28 I. C. C. Rep. 533.
Waverly Oil Works vs. P. R. R. Co., 28 I. C. C. Rep. 621.
St. L. S. & P. R. R. Co. vs. P. & P. U. Ry. Co., 26 I. C. C. Rep. 226.
Morris Iron Co. vs. B. & O. R. R. Co., 26 I. C. C. Rep. 240, 244.
R. R. Com. of Ark. vs. St. L. I. M. & S. Ry. Co., 24 I. C. C. Rep. 292.
Merchants & Mfgs. Assn. vs. P. R. R. Co., 23 I. C. C. Rep. 474, 476.
Mfgs. Ry. Co. vs. St. L. I. M. & S. Ry. Co., 21 I. C. C. Rep. 304, 309.
Buffalo Union Furnace Co. vs. L. S. & M. S. Ry. Co., 21 I. C. C. Rep. 620, 627, 630.
Baltimore Butchers Live Stock Co. vs. P. B. & W. R. R. Co., 20 I. C. C. Rep. 124.
S. W. Produce Distributers vs. Wabash R. R. Co., 20 I. C. C. Rep. 458, 460, 462.
Mosson Co. vs. P. R. R. Co., 19 I. C. C. Rep. 30.
Associated Jobbers of Los Angeles vs. A. T. & S. F. Ry. Co., 18 I. C. C. Rep. 310, 316.
Enterprise Fuel Co. vs. P. R. R. Co., 16 I. C. C. Rep. 219, 224.

CHAPTER VIII.

EMBARGOES AND REGULATIONS GOVERNING.

§ 1. Definition of "Embargo".
§ 2. Illustration of Operation and Status of Embargo.
§ 3. Interstate Commerce Commission Without Power to Lay Embargo, but is Empowered to Raise Embargo.
§ 4. Demurrage May Not Lawfully Accrue When Caused by Delivering Carrier's Embargo.
§ 5. Short Notice Tariffs Permitted Account Embargo.

CHAPTER VIII.

EMBARGOES AND REGULATIONS GOVERNING.

§ 1. Definition of "Embargo."

In early maritime commerce an embargo was an order of the Government prohibiting the departure of ships or of goods from some or all of the ports within the dominion.

Webster's Unabridged Dictionary.

From being an order of the sovereign government or power, the word embargo eventually became a term designating the detention of a vessel in port either at the wish to its owner or by conditions inimicable to its departure. In the development of steam as a motive power, the word embargo took its place in the nomenclature of the new agency of transportation—the railroad.

The Commission has said of an embargo:

"Primarily, it is not intended as an incentive to promptly release equipment but to prevent further movement until such time as measures can be taken to remove accumulation of cars."

Peale, Peacock & Kerr vs. C. R. R. Co. of N. J., 18 I. C. C. R. 25, 34.

An embargo is a war measure or an extraordinary remedy resorted to by the carrier because of conditions

beyond its control, such as the act of God, the public enemy, or extraordinary congestion of traffic on its lines. An embargo takes the form of an order directed against connecting line carriers refusing to accept traffic, or some particular class of traffic, for some or all deliveries on the embargoed line.

§ 2. Illustration of Operation and Status of Embargo.

In the case of Missouri & Illinois Coal Co. vs. I. C. R. R. Co., decided December 13, 1911, and reported in 22 I. C. C. Rep. 39, the usual form of embargo, its effect, and the right of the carrier to establish the embargo, are pointedly illustrated and explicitly dealt with by the Interstate Commerce Commission.

On November 12, 1910, the Illinois Central Railroad Company, through its coal traffic manager, issued and put into effect the following embargo:

"ILLINOIS CENTRAL RAILROAD COMPANY,
Office of the Coal Traffic Manager.
"Chicago, November 12, 1910.

"To coal operators and dealers:

"Until further notice Illinois Central and Indianapolis Southern coal cars must not be loaded with coal at mines on these roads to points on or reached via any of the following named roads, viz.:

"The Missouri Pacific Railway;
"St. Louis & San Francisco Railroad;
"Chicago & Eastern Illinois Railroad;
"Chicago & Alton Railroad;
"Iowa Central Railroad via Peoria;
"Chicago, Rock Island & Pacific Railroad;
"Chicago, Burlington & Quincy Railroad;
"Wabash Railroad;

"Ft. Dodge, Des Moines & Southern Railroad;
"Chicago & North Western Railroad via Peoria;
"Toledo, Peoria & Western Railway via Peoria;
"Missouri, Kansas & Texas Railway beyond St. Louis switching limits;
"St. Louis & Southwestern Railway.

"Exception: Illinois Central and Indianapolis Southern coal cars may be loaded to points on the C., B. & Q. R. R. within the switching districts of Chicago and Omaha when routed via I. C. R. R. through to Chicago and Omaha.

"Illinois Central and Indianapolis Southern coal cars must not be loaded with fuel coal for foreign railroads.

"Embargo restrictions heretofore issued are amended in accordance with the foregoing, except that this does not amend the restrictions against individual consignees issued on account of accumulations.

"This does not change the rule that coal shipments for points on the Illinois Central Railroad west of Freeport, Ill., shall be routed via Illinois Central Railroad through to destination.

"Illinois Central and Indianapolis Southern coal cars may not be reconsigned contrary to the foregoing.

"Yours truly,
"CHARLES C. CAMERON,
"Coal Traffic Manager."

Before considering the legal status of the above order a recitation of all the facts is essential.

The general superintendent of transportation of the Illinois Central had sought to avert the necessity for the issuance of the embargo by entering into an agreement with other carriers that coal equipment would be promptly returned. One of the letters received in reply presents with clearness the situation with which the Illinois Central had to deal:

"MISSOURI PACIFIC RAILWAY CO., ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. CO.

"Kansas City, September 13, 1910.

"Mr. J. M. Daly, General Superintendent of Transportation, I. C. R. R., Chicago, Ill.

"Dear Sir: Your personal letter of September 5 with reference to the coal situation during the coming winter.

"I agree with you that there will be an extraordinary demand for coal car equipment on account of the deplorable situation which has kept the mines idle for the past five or six months. I also agree with you that in past years the ownership of cars has been practically disregarded by many lines in the handling of coal car equipment; at least there were about 3,000 of our coal cars away from home all last winter, which were not returned to us until after the demand for them had ceased, in April.

"I think I can safely promise you that we can stop the reconsignment of coal cars delivered to us for unloading within the switching territory and will undertake to do this, so far as your cars are concerned, coming on our rails for industrial switching at St. Louis.

"We are the heaviest switching line at St. Louis, and while it is my intention to carry out this agreement in good faith, I do not propose entering into it with certain lines only and allow other lines to disregard the arrangement so far as our cars are concerned. There are certain lines, your own being one of them, that have little or no territory which our coal operators desire to reach, and consequently they have few opportunities of diverting our cars. On the other hand, there are several lines that have opportunities for getting a great many of our coal cars, and they did not hesitate last year in taking advantage of their opportunity. If they adopt the same practice this year I will, naturally, be compelled to protect this company in

the only way possible—by confiscating all coal cars coming on our rails.

"I trust this will not be necessary, and in the meantime I will carry out the above arrangement with you in good faith. Yours truly,

"E. F. KEARNEY,
"Supt. Transportation."

That this agreement became utterly ineffective is apparent from the following table of the total number of coal cars owned by the Illinois Central and their location at stated periods from September 25 to December 25, 1910:

Statement showing the number of Illinois Central coal cars on tracks of roads shown and the number of their coal cars on Illinois Central tracks during the months of September, October, November, and December, 1910.

I. C. Cars on Foreign Roads.

	Sept. 25.	Oct. 25.	Nov. 25.	Dec. 25.
Mo. Pac.	889	616	391	412
C. & A.	182	213	106	46
C., B. & Q.	379	607	476	234
C., R. I. & P.	354	654	427	234
C. & E. I.	92	175	36	20
St. L. & S. F.	237	261	184	135

Foreign Cars on I. C.

Mo. Pac.	32	41	63	77
C. & A.	53	49	44	54
C., B. & Q.	21	79	39	40
C., R. I. & P.	82	49	103	69
C. & E. I.	85	130	102	73
St. L. & S. F.	78	118	134	106

Statement of Illinois Central system coal cars owned and location of such cars at bimonthly periods from September 25 to December 25, 1910.

	Sept. 25	Oct. 10	Oct. 25	Nov. 10	Nov. 25	Dec. 10	Dec. 25
Total cars owned....	22,604	22,542	22,519	22,491	22,465	22,460	22,450
Total cars on Ill. Cent. system	14,906	14,225	14,172	14,509	15,006	15,521	16,139
Total on other lines..	7,698	8,317	8,347	7,982	7,559	6,939	6,311

The significance of these tables is clear when we analyze the car record statement for October 25, 1910, for instance. On that date the Illinois Central owned 22,519 cars, of which 14,172 were in the custody of the Illinois Central Railroad, and 8,347 were on other lines—616 on the Missouri Pacific, 607 with the Burlington, 654 with the Rock Island, 398 with the North Western, 261 with the St. Louis & San Francisco, 175 with the Chicago & Eastern Illinois, 213 with the Chicago & Alton, 110 with the Iowa Central, and 170 with the Wabash. During the whole period something over 35 per cent of the Illinois Central's equipment was off its own line, and during that same time the Illinois Central was called upon by its shippers for an average of about 500 cars more per day than it could supply. It took an average of from 32 to 57 days to secure the return of a coal car which passed from the Illinois Central's rails, whereas a reasonable time would have been about 6 days. The foreign carriers, once they had possession of these cars, would use them for their own purposes, sending them with loads to points still farther from their home rails. The Illinois Central could not even secure cars from certain of its connections for the transportation of company fuel destined to these connecting lines.

We come now to the issues presented before the Commission. The complainant, the Missouri & Illinois Coal Company, showed that at one time during this period it requested 50 cars for delivery at Belleville, to be loaded with Missouri Pacific coal, but the Missouri Pacific refused

to furnish the cars for this purpose. Again this complainant sought to ship 100 loads of fuel coal to the Burlington road, but that line refused to furnish cars for that purpose. The main contention of the complainant was that whenever a carrier has made through routes and joint rates with other railroads it must under all circumstances furnish the equipment demanded by its shippers, and that the establishment of an embargo is of itself illegal. The Illinois Central contended that in justice to the communities dependent immediately upon it for their winter supply of coal, the embargo instituted in the fall of 1910 was a necessity; that refusal to permit its own cars to leave its own rails was made necessary by the confiscation of its cars by other railroads, and that it would have been neglectful of its primary obligation to its local business had it permitted the equipment on its road to be still further drawn upon by foreign lines which could not be induced to return the same at a time of car shortage.

The embargo ran against all roads in the same territory. The evidence in the case fell short of establishing that the Illinois Central had failed to supply itself with a sufficient quantity of the proper character of equipment. On the contrary it was adequately equipped for its own needs, even in time of car shortage, and its practice was to allow equipment to move freely from its own lines to those of its connections. During the pendency of this embargo, however, the Illinois Central not only refused to allow its cars to leave its road, but refused to load its cars for points on certain foreign roads and to make transfer thereto.

The case of Riddle Dean & Co. vs. P. & L. E. R. R., 1 I. C. C. Rep. 385, 490, was cited and relied upon at the hearing. This case has held that the legal duty of the railroad company was to operate its cars so as to keep them as much as possible on its own line and confined to the busi-

ness of its line, in time of car stress, and if it could not furnish sufficient cars to all shippers along its line, it should fairly endeavor to furnish its cars to shippers of coal in proportion to their shipments over its line upon a basis that was relatively and substantially just, the original Commission having said:

"The first ground of complaint is that the Pittsburgh & Lake Erie Railroad Company, during the period commencing September 28, 1887, and ending October 12 of the same year, violated section 3 of the Act to Regulate Commerce approved February 4, 1887, by giving an unlawful preference to other coal mines situated along that portion of its line known as the Pittsburgh, McKeesport & Youghiogheny Railroad in not having furnished their proportion of cars daily to the Rainbow Coal Company and the Lake Shore Gas Coal Company for shipments of coal to Buffalo, in the state of New York.

"By what construction the evidence in this proceeding could be held to sustain the charge we are unable to perceive. The Pittsburgh & Lake Erie Railroad is a local, interior road, with its termini at New Haven, in the state of Pennsylvania, and Youngstown, in the state of Ohio; and it does not extend to Buffalo. The Pittsburgh & Lake Erie Railroad Company was not then permitting any of its coal cars to go to Buffalo for reasons which were sufficient and in no way in conflict with either the spirit or letter of any of the provisions of the Act to Regulate Commerce. These reasons were that on account of causes, for which it was in no sense responsible and for which it could in no way be justly blamed, it then had more work than it could possibly do in transporting freights over its own line, and if it had permitted its coal cars to go to Buffalo with coal for these two mines it would have resulted in these cars being absent from its line for certainly

one week and more probably ten days or two weeks, according to the evidence, and it would have thereby rendered itself less able to serve all the business over its line. If complainants had a right to insist that this company should send its cars at such a time with coal to Buffalo, then every other coal mine on its line had the same right, and this would have stripped this railroad of its equipment, leaving other business along its line to go to ruin, but none of them had any such right. The company had its legal duty to perform. Its first and most paramount legal duty to the shipping public was to make its entire freight equipment do its utmost in serving the shippers along its own line. For this purpose, amongst others, it had been chartered by the states of Pennsylvania and Ohio, and for this purpose, chiefly, it had been constructed by those who had furnished their means and subscribing to its stock. If between the 28th of September, 1887, and the 12th of November following, when, as shown by the evidence, this railroad company was unable by its utmost efforts, with all of its freight equipment added to that of the freight cars supplied to it by its connecting lines, to move promptly more than one-half of the freights as fast as they accumulated along its line, it had furnished coal cars to the mines of the Rainbow and Lake Shore Gas Coal companies to ship coal to Buffalo in order that they might obtain a better price for it than other shippers along its line were receiving at Cleveland and Ashtabula, and this, too, when it was refusing cars to all other shippers of coal to Buffalo, thus giving to complainants this exceptional advantage, it is quite possible that it would have been guilty of a violation both of the letter and spirit of section 3 of the Act to Regulate Commerce. Under such circumstances the legal duty of this railroad company was, as the evidence shows it did, to operate its

cars so as to keep them as much as possible on its line and confined to the business of its line. If, in that crisis, it could not furnish sufficient cars to all the shippers along its line for the amount of their freight, then it was its duty to have done what is shown by the evidence it did, and this was to fairly endeavor to furnish its cars to shippers of coal in proportion to their shipments over its line upon a basis that was relatively and substantially just."

In the Missouri & Illinois Coal Company case the Commission reaffirmed its earlier statement of the law, and said:

"No better statement of the law as it then existed could be made than that above quoted. But the Act to Regulate Commerce has expanded since the day of that decision.

"This case raises two questions of first importance: (1) What is the duty of the carriers with respect to the operation of through routes? (2) What power has been vested in the Commission to enforce the requirements of the law?

"There can be little doubt as to the duty of the carriers under the present act. The commerce of the country is regarded as national, not local, and the railroads are required to serve the routes which they have established, or which they may have been required to establish, in connection with other carriers, without respect to the fact that this may carry their equipment beyond their own lines. In the opening section of the Act is to be found this mandate:

" 'It shall be the duty of every carrier subject to the provisions of this Act * * * to establish through routes and just and reasonable rates applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein, and for the operation of such through

routes, and providing for reasonable compensation to those entitled thereto.'

"It would be difficult to draft language more direct than this, or language that would more clearly express the intent of Congress that our commerce shall flow freely in established channels, without hindrance, embarrassment or delay. Supplementing this provision, the Act proceeds in this broad and inclusive language which is here subdivided for the purpose of bringing out its meaning and its direct application to the railroad practice hereunder consideration:

" 'And it is hereby made the duty of all common carriers subject to the provisions of this Act—

to establish, observe and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations or practices are or may be made or prescribed.

and just and reasonable regulations and practices affecting classifications,

rates or tariffs,

the issuance, form and substance of tickets, receipts and bills of lading, the manner and method of presenting, marking, packing and delivering property for transportation,

the facilities for transportation,

the carrying of personal, sample and excess baggage,

and

all other matters relating to or connected with the—

receiving,

handling,

transporting,

storing, and

delivery

of property subject to the provisions of this Act which

may be necessary or proper to secure the safe and prompt
receipt,
handling,
transportation, and
delivery
of property subject to the provisions of this Act, upon just and reasonable terms,
and every such unjust and unreasonable regulation and practice with reference to commerce between the states and with foreign countries is prohibited and declared to be unlawful.'

"Reading these italicized words together, this section would read:

"'And it is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe and enforce just and reasonable regulations and practices affecting the facilities for transportation and all other matters relating to, or connected with, the transporting and delivery of property subject to the provisions of this act which may be necessary or proper to secure the safe and prompt transportation and delivery of property upon just and reasonable terms, and every such unjust and unreasonable regulation and practice with reference to commerce between the states is prohibited and declared to be unlawful.'

"The term 'transportation,' as defined in a previous paragraph of the same section, includes:

"'Cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported;

and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.'

"Further in that section of the Act making it unlawful to give any undue or unreasonable preference or advantage, or to subject any particular person or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever (section 3), are to be found these words:

"'Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.'

"Reading these provisions together, there can be no doubt as to the intent of Congress. Our railroads are called upon to so unite themselves that they will constitute one national system; they must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other. The full burden of this great obligation is in the first instance cast upon the carriers themselves. In compliance with these recognized requirements of the law the carriers have undertaken to establish a body of rules and by co-operation in their

enforcement insure the fulfillment of the law's demands. The duty of the initial carrier to furnish equipment for a shipment which moves on to other lines is universally recognized, and in cases where that is impracticable or deemed unwise the carriers assume to bear the burden of the transfer from the equipment of one line to that of the other. By agreement the carriers have fixed the rental value of a car for their own purposes at 30 or 35 cents a day. That rental, together with the rules governing the movement of foreign equipment (equipment not belonging to the line upon which it stands), is presumed to secure the return to the initial carrier of its own equipment. Manifestly, however, as revealed in the investigation into car shortage of some four years ago, and as shown in this case, such rental and rules are sometimes not equal to the necessities of the situation and do not fully compel compliance with the duties imposed by the Act. Instead of an orderly system of car interchange carried out in good faith, we find in this case one road stealing the equipment of its connection by way of reprisal against similar thefts of which it is the victim. The result is that the coal company in Illinois, which has undertaken by contract to serve industries in Missouri, is cut off from its market by reason of the closing of the route which the law requires the Illinois Central and the Missouri Pacific to maintain and keep open.

"The complainant here was entitled at all times to send its coal to points upon the Missouri Pacific and through other connections at St. Louis to points upon their lines. It is not an adequate defense for the Illinois Central to say that this route was closed because of the dishonorable conduct of its connections. The burden rests upon these carriers to keep their highway between the mine in Illinois and the factory in Missouri open and to devise some

method by which this can be done. The coal mine is entitled under the law to rely upon the carrier maintaining its route irrespective of the unfriendly relations that may exist between the carriers. The commerce of this country can not be conducted under a system of railroad operation based upon such primitive practices of warfare as reprisal and embargo. Such methods are not the expression of civilization which leads to order, system and certainty, but are the loose and archaic methods of a disorganized industrial system.

"There may be times when an embargo is justifiable because of the physical inability of the carrier for some reason to deal with the traffic which overwhelms it, but such an embargo as was established in this case is not contemplated in the law and is not consonant with the service which the carriers constituting the through route are required to give.

"As already seen, the Illinois Central did not cut the through route by establishing the embargo until by negotiation it had failed to preserve itself against the unlawful encroachments of its connections. Relying then upon the fundamental law of self-protection, it kept its equipment upon its own tracks as against those roads who sought by the law of the jungle to secure equipment for their own needs. Further, it is to be said on behalf of the Illinois Central that it was adopting a practice and applying a method which had long prevailed as between carriers in times of car shortage, and its management undoubtedly felt, as the record indicates, that it could not with justice to its own dependent public permit its line to be skinned of equipment for the benefit of other roads which may not have provided themselves with sufficient equipment for their own needs or which found it profitable to forcibly rent cars at a time of traffic pressure. In following this

procedure it was acting paternally and no doubt in good faith; it was attempting to cure in an emergency a situation arising out of its own delinquency in the past, for if it had made proper conditions attaching to the return movement of its cars no such condition would have arisen as made this embargo necessary. The Illinois Central sought to protect 'its own people,' but in contemplation of the law there is no such thing as local traffic which enjoys rights superior to through traffic. There can be no discrimination or preference in favor of the Illinois coal buyer as against the Missouri buyer, although one may be local to the Illinois Central and the other may be on the line of a connecting carrier. That all carriers have not fully recognized this principle is not to be wondered at, inasmuch as it is, as shown by the history of the Act to Regulate Commerce, a matter of evolution, for it was not until the amendment of 1910 that the principle was announced in its fullness.

"We pass next to the second question, that relating to the power of the Commission. As has been said, the law does not assume that the Commission will take the initiative in these matters, and the carriers are called upon to establish the through routes and to maintain them. They have it within their own power to enforce rules as between each other by which this command of the law may be observed. If, however, as in this case, it is seen that the methods pursued by the carriers relating to the return of equipment are not such as to protect shippers against discrimination and injustice, this Commission may undertake to prescribe the conditions under which these through routes shall be maintained, for it is provided (section 15):

" 'That whenever the Commission shall be of the opinion that any individual or joint regulation or practice whatsoever of such carrier or carriers subject to the provisions of

this Act are unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what individual or joint regulation or practice is just, fair, and reasonable to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall conform to and observe the regulation and practice so prescribed.'

"Clearly the Illinois Central and its connections have not obeyed the mandate of the law as found in section 1. The remedy is found in an appeal to this Commission under section 15, as above quoted. The power here lodged in the Commission as to the control and regulation of railroad practices has been exercised but seldom by this Commission, but our authority to so regulate and control practices has been given the fullest confirmation in two masterful decisions of the Supreme Court written by Mr. Chief Justice White. Interstate Commerce Commission vs. I. C. R. R. Co., 215 U. S. 452; Baltimore & Ohio R. R. Co. vs. United States ex rel. Pitcairn Coal Co., 215 U. S. 481. It may be said that these opinions dealt entirely with the relation between carriers and their shippers, whereas the question here involved is one which makes it incumbent upon the Commission to deal with the relationship between carriers. This, however, we would do only as an incident and necessary corollary to our duty to protect the shipper. The law's requirements as to the duty of the carrier to the shipper to furnish equipment and maintain its through route carries with it necessarily the power on the part of this Commission to enforce rules which will permit the free interchange of traffic as between carriers.

The carriers must keep their through routes open, and if they fail to do this because of the diversion or appropriation of cars this Commission has it within its power to prescribe the conditions upon which such through routes shall be operated.

"No testimony has been taken in this case as to the rules that should be enforced, and our power would not be exercised in any event without the fullest hearing as to the effect of any order that the Commission might make would have upon the practices of the railroads of the country. Moreover, we think it sufficient for the purposes of this case to present to the carriers what we regard as the law upon the subject touching their duty as between themselves and the shipper and ultimately as between each other. The carriers must make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used upon their through routes and for the operation of such through routes (section 1), and where they have failed in this respect and 'are in violation of any of the provisions of this Act' the Commission is empowered to determine the individual or joint regulation or practice that is just, fair, and reasonable (section 15).

"Prayer is made for an award of damages arising out of the embargo placed upon complainant's shipments. This we are constrained to deny for the reason that it was not shown by the complainant with any definiteness that it suffered damage. Its principal witness admitted that it may have been true that the complainant loaded, shipped, and sold more coal during the time the embargo was in effect than it did in the same number of months in the year before, and while stating that it was compelled to sell for less than it would have received if the embargo had not been in effect, it could not state how much less."

It must not be concluded from this ruling by the Com-

mission that all embargoes are unlawful. Rather that the controlling factor is not the embargo itself, but whether the cause or necessity for the embargo arises out of the carrier's omission to do that which the law makes it its duty to do, and which if done would have prevented the necessity for an embargo to be laid. It looks to the substance of the carrier's compliance or noncompliance with its legal obligations in its relations with its shippers or with other carriers. For instance, the Pennsylvania Railroad might issue an embargo against the loading of Pennsylvania coals consigned to points on the Chicago & North Western Railway, because of the physical inability of the latter line to receive and move the coal at Chicago due to extraordinary congestion, or an interruption of its railroad by the act of God, or the public enemy. And even though the Chicago & North Western's inability to receive and handle the coal at its Chicago junction with the Pennsylvania line might arise out of its failure in its legal duties, the Pennsylvania's embargo would not be unlawful if it were shown that the Pennsylvania had observed a full compliance with its legal duty to keep the route open. In this instance, the Chicago & North Western would be subject to scrutiny as its compliance with its statutory obligations. To determine, therefore, the lawful or unlawful status of an embargo, the act or omission of the carrier or carriers involved must be looked to as the condition precedent to the cause or necessity for the embargo.

Compare—

Daish & Sons vs. C. A. & C. R. Co., 9 I. C. C. R. 513.

§ 3. Interstate Commerce Commission Without Power to Lay Embargo, but is Empowered to Raise Embargo.

It is not within the power of the Commission to order a carrier to interdict a particular shipper from engaging in

interstate transportation. The only ground upon which the Commission can give consideration to the question of embargoes is on an allegation that an embargo or a series of embargoes have resulted in undue discrimination. An embargo in character is a war measure or extraordinary discrimination designed to prevent further movement until such time as measures can be taken to remove the accumulation of equipment, and not to operate as an incentive to promptly release cars.

> Peale, Peacock & Kerr et al. vs. C. R. R. Co. of N. J., 18 I. C. C. R. 25, 34.

It will be noted that in its report in the Missouri & Illinois Coal Company Case, supra, the Commission declared its power and authority vested in it by the amendment to the Act of 1910. Instead of dealing with embargoes only upon the ground of alleged discrimination, it is plain that the Commission now conceives it to be its duty to view embargoes from the standpoint of an interference with the free interchange of interstate commerce arising out of the carrier's remission of duty in failing to keep open established through routes under reasonable and effective regulations not only between itself and its shippers, but between itself and other carriers involved in the maintenance of such through routes. If the fullness of the new power lodged in the Commission to require that done which shall give to interstate commerce the freest possible interchange and fluidity, is to be realized, it is patent that the Commission must scrutinize more than the relationship of the carrier with its shippers; it must pass unhesitatingly to the cause which may effect a change in a proper relationship between the carrier and its shippers—the relationship of a particular carrier with other carriers and the regulations and practices in effect between such carriers

governing the interchange, not only of the traffic itself, but of the facilities and instrumentalities necessary to afford such traffic that ease and freedom of interchange which the law in its present form contemplates it shall possess.

Penna. Paraffine Works vs. P. R. R. Co., 34 I. C. C. Rep. 179, 193.

See also—

Corp. Com., etc., vs. A. T. & S. F. Ry. Co., 34 I. C. C. Rep. 292, 310.
Morse Lumber Co. vs. L. & N. R. R. Co., 33 I. C. C. Rep. 571.
Blake Co. vs. M. St. P. & S. S. M. Ry. Co., 33 I. C. C. Rep. 270, 271.
Pittsburgh & S. W. Coal Co. vs. W. P. T. Ry. Co., 31 I. C. C. Rep. 660, 662.
Rates on Cotton and Cotton Linters, 30 I. C. C. Rep. 467, 468.
Onion Rates to New York, N. Y., 30 I. C. C. Rep. 528, 529, 530.
N. Y. Hay Exchange Assn. vs. L. V. R. R. Co., 29 I. C. C. Rep. 90, 93.
American Hay Co. vs. C. V. R. R. Co., 29 I. C. C. Rep. 659, 660.
Colorado Coal Traffic Assn. vs. C. & S. Ry. Co., 24 I. C. C. Rep. 618.
Mo. & Ill. Coal Co. vs. I. C. R. R. Co., 22 I. C. C. Rep. 39, 47.

§ 4. Demurrage May Not Lawfully Accrue When Caused by Delivering Carrier's Embargo.

February 22, 1907, a Chicago road placed an embargo on hard and soft coal for delivery within the Chicago terminal district switching limits, due to limited facilities and congestion in that district. Another line bringing "flat-billed" coal into the Chicago terminal district, which was there reconsigned to points restricted by the said embargo, was obliged to hold such coal shipments in its own storage yard, and assessed demurrage charges on all such cars so held.

The only tariff authority for the imposition of these demurrage charges was the following:

"Cars held for consignors or consignees for loading, unloading, forwarding directions, or for any other purpose, are subject to the following car service rules."

The authority to assess the car service charge and the lawfulness of the charge was dependent upon the following holdings of the Commission:

"A shipper or consignee may not be required to pay a demurrage charge unless the carriers' tariffs provide for same in clear and specific form and manner."

Munroe & Sons vs. M. C. R. R. Co., 17 I. C. C. R. 27.
Tioga Coal Co. vs. C. R. I. & P. Ry. Co., 18 I. C. C. R. 414.

Demurrage may not be assessed except for or because of the failure of the shipper or consignee to comply with his obligations.

Coomes & McGraw vs. C. M. & St. P. Ry. Co., 13 I. C. C. R. 192.
N. Y. Hay Ex. Assn. vs. P. R. R. Co., 14 I. C. C. R. 178.
Porter vs. St. L. & S. F. R. Co., 15 I. C. C. R. 1.
Am. Creosoting Wks. vs. I. C. R. R. Co., 15 I. C. C. R. 160.
Rossie Iron Ore Co. vs. N. Y. C. & H. R. R. R. Co., 17 I. C. C. R. 392.

Where a switching service is yet to be performed delivery has not been effected.

McNeill vs. S. Ry. Co., 202 U. S. 543, citing
Rhodes vs. Iowa, 170 U. S. 412; L. & N. R. R. Co. vs. Stock Yards Co., 212 U. S. 143; Union Stock Yards Co. vs. U. S., 164 Fed. Rep. 404.

In this case the Commission said:

"We are of the opinion that the demurrage charges here complained of were assessed by the Baltimore & Ohio

without proper provision therefor in its tariffs. Tariff authority for such charges would, we think, be unreasonable and unjust unless confined to instances in which cars are held by request or neglect of shipper or consignee."

Crescent Coal & Mining Co. vs. B. & O. R. R. Co. et al., 20 I. C. C. R. 559, 561, 570.

See also—

New York Hay Exchange Assn. vs. L. V. R. R. Co., 29 I. C. C. Rep. 90, 92.

§ 5. Short Notice Tariffs Permitted Account Embargo.

Embargoes against the receipt of freight have been established by Mexican railroads at different times on account of revolutionary troubles in Mexico. Upon inquiry, the Commission held that interstate carriers in the United States, under the special circumstances, will be permitted to file with the Commission the proper application for authority to establish on short notice tariffs naming the conditions and rates under which they will return or otherwise dispose of property billed to points in Mexico, but which they have been unable to deliver because of the revolutionary conditions in that country. It is understood that the tariffs will arrange that those carriers which participated in the haul within the United States will prorate the expenses of per diem, storage, loading and unloading of the shipments, or of their return to the points of origin.

I. C. C. Confr. Rulings Bulletin No. 6, Ruling No. 437.

CHAPTER IX.

TAP LINES AND INDUSTRIAL RAILROADS.

§ 1. Tap Lines Defined.
§ 2. Each Tap Line Case Must Stand on Its Own Merits.
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CHAPTER IX.

TAP LINES AND INDUSTRIAL RAILROADS.

§ 1. Tap Lines Defined.

Originally it was usual to refer to all the rails used in a lumber mill operation as a "logging road." But since the practice of making allowances to the lumber companies west of the Mississippi River came into vogue, and more particularly within the last four or five years, the rails leading from the mill to or through the timber, and usually to a logging camp or company town, have come to be known as a "main" or "tap" line. The spurs radiating into the forest from that point or from other points along the tap line are now usually referred to as "logging roads."

It is not practical to define generally the physical characteristic of a tap line, but its transportation status and relations to the proprietary lumber companies may be readily perceived from the ensuing sections.

§ 2. Each Tap Line Must Stand on Its Own Merits.

In its investigations and reports in the Tap Line cases, the Commission looked to the character of the service rendered to determine the status of the tap line. In its first report the Commission found:

"An industrial railroad, as that phrase is now commonly used, is a short line constructed primarily to serve the particular plant or industry in the general interest of which it

is owned and operated. It consists of the tracks connecting the various factories, warehouses, and other buildings of the industry with one another, and ordinarily has a connection with one or more adjacent trunk lines by means of a track leading from the plant to their rights of way. It serves the industry by receiving its inbound shipments of raw materials from the trunk lines at agreed interchange points, distributing them among the various buildings according to the requirements of the manufacturing operations, and by taking its finished products from the plant to the trunk lines; it is also often in a position to effect all the necessary movements of materials and partially finished products from building to building within the plant. The rails, tracks, and locomotives are more frequently operated as a bureau of the industry and no pretense is made of serving outside interests. In recent years, however, a practice has grown up under which the rails, tracks, and locomotives operated and used in and around an industrial plant, when set over to a small incorporated railroad company, organized for the purpose and owned by the industry or in its interest, are thereafterward dealt with by the regular lines as something wholly apart from the industry and as if they constituted a common carrier in the service of the general public, participating on an equal basis with other carriers in the transportation of the traffic of the country. On this theory of their status many industrial lines receive allowance out of the rates both on the traffic of the controlling industry and upon such traffic of outside interests as they may handle.

"In the operation of manufacture and production it was first the practice to use horses and wagons for handling materials in and about the industrial plant, and in the same way to haul the raw material from the tracks of the public carrier to the plant, and to haul the manufactured

product from the plant to the carrier's station. Later push-carts and handcars, sometimes moving on rails, cranes, conveyors, and other appliances were brought into use. These facilities are still to be found in many of the smaller industries. But with the combinations of capital and the concentration of manufacturing operations into large plants, railroad tracks, cars, and locomotives have become necessary to avoid delay and expense in handling the raw material into and in and about the plant, and in order to deliver the manufactured products as cheaply as possible from the plant to the carriers that move them to the markets. It can not be doubted that large economies in the cost of manufacture and production have been effected in that way. When the service is performed on rails by a bureau of the industry and with locomotives that it owns and with crews that it employs, this change in method was manifestly not a change in the thing done but simply a change in the facility used for doing the same thing. Whether the service, so far as the controlling industry is concerned, takes on another aspect when the rails and locomotives have been set over to an incorporated railroad company owned by or in the interest of the industry, and service performed by the horses and carts and other appliances formerly used by industrial companies and still used by the smaller concerns, is a question that manifestly must depend upon the facts in each case.

"The number of industries that use rails and locomotives in connection with their manufacturing operations is increasing, and there is a growing number of cases where allowances out of the rates are made to them by the regular lines. It is clear, therefore, that the time has come when the Commission must draw a line at some point between what is transportation and what is industry, and must distinguish between what is a facility of transporta-

tion and what is a plant facility or a tool of the industry. In the present state of the law it is no less clear, however, that the question is not susceptible of solution on general grounds; that no general rule or principle may be laid down that will do exact justice in all cases; and that the only safe course is to ascertain and determine on the facts disclosed in each case what is the real relation between the tap line and the industry by which or in the interest of which it was constructed and is now operated. With that view of the matter in mind, we have carefully analyzed the testimony offered by each of the tap lines appearing of record and shall presently state each case in a summary outlining the features shown of record that we regard as of importance.

"Before doing that, however, it may be well to look for a moment into the practice of the trunk lines in this territory in connection with their lumber traffic:

"It is our understanding that in some cases the trunk lines have connected their rails with the mills by constructing spur tracks at their own expense; in other cases they have furnished the rails and the ties and the lumber companies have borne the expense of the grading and construction, and in a number of cases the lumber companies have built the connection entirely at their own cost, either directly or through their tap lines. In some instances the original spur or switch track built by the trunk line to the mill still remains and could be used; as a matter of fact, however, the tap-line connection subsequently built is actually used. In some cases, where the tap line has connected the mill with the trunk line, the spur track of the trunk line to the mill has been torn up. In some instances the trunk line is still closely connected with the mill by an available switch track, but in order to give the appearance of a real service the tracks of the tap line have been laid

parallel to the trunk line to a more distant switch connection.

"In all cases it is apparently the practice of the trunk lines, where no allowance is made, to set the empty car at the mill and to receive the loaded car at the same point. Indeed, they do this in many cases even when an allowance is made to the tap line. But whenever this service is performed by the trunk line, it is included in the lumber rate and is done without additional charge. In some instances the switch or spur track connecting the mill with the trunk line is as much as three miles long. In other words, by their common practice the public carriers interpret the lumber rate as applying from mills in this territory apparently as far as three miles from their own lines. So far as the manufactured lumber is concerned, it may therefore be said that where a mill has a physical connection with a trunk line and is not more than three miles distant the transportation offered by the trunk line commences at the mill. If, therefore, a lumber company, having a mill within that distance of a trunk line, undertakes, by arrangement with the trunk line, to use its own power to set the empty car at the mill and to deliver it when loaded to the trunk line, it is doing for itself what the trunk line, under its tariffs, offers to do under the rate. In such a case the lumber company may therefore fairly be said to furnish a facility of transportation for which it may reasonably be compensated under section 15 whether its tap line is incorporated or unincorporated. In other words, the lumber company thus does for itself what the trunk line does with its own power at other mills without additional charge and what it must therefore do for the particular lumber company without additional charge. Under such circumstances we think the lumber company, under section 15, may have reasonable compensation when it relieves the

trunk line of the duty. But an allowance under such circumstances is lawful only when the trunk line prefers, for reasons of its own and without discrimination, to have the lumber company perform the service. It is not lawful when the lumber company refuses to permit the trunk line to do the work. No allowance, however, ought to be made by a trunk line to a lumber company where the mill is within, say, 1,000 feet of the trunk line. We should regard an allowance under such circumstances as a mere device to effect an unlawful payment to the lumber company. We should take the same view of an allowance where a short switch track to the mill has been torn out or is still available but not used in order to give the appearance of a longer haul to the mill over a spur or switch track constructed by the lumber company or by its tap line.

"Where a mill is distant more than three miles from a trunk line and is connected with the latter by a tap line not recognized by this Commission as a common carrier in respect of the service performed for its proprietary lumber company, no allowance or division may lawfully be made by a trunk line either to the lumber company or to its tap line. Such a lumber company, although using rails, stands in no better position under the law with respect to its lumber than does a lumber company that uses other means of delivering its lumber to a public carrier. But where a mill is more than three miles distant from a trunk line and is connected with it by a tap line organized as a common carrier and so recognized by this Commission, the mill is to be regarded as a shipping point equally with all other mill points in the extensive rate group which the trunk line carriers have defined in this territory; and the lumber rate is to be regarded as in effect from the mill, the tap line being entitled to a division thereof according

to the extent of its participation in the through service under the through rate.

"This view of the matter, it must be clearly understood, is based upon the particular conditions that we find existing in this lumber territory and the rate adjustment which there obtains."

The Tap Line Case, 23 I. C. C. Rep. 277, 278, 280, 293, 295.

In its first supplemental report in the Tap Line Case, the Commission further referred to the status of the tap line as follows:

"In a number of cases the tap line without charge hauls the logs of the lumber company that owns it. In other cases the lumber company itself hauls its logs over the tap-line rails to its mill. In some instances its right to do this is evidenced by a formal trackage contract; in other instances it is done under a verbal understanding. In some cases no charge is entered up by the tap line against the lumber company for this use of its tracks, and in a few cases the lumber company pays a small compensation. In several instances the trunk lines themselves have given trackage rights for a small toll to lumber companies. We have not understood that special privilege of this kind may lawfully be granted to a shipper. It is not uncommon for one railroad to give the use of its rails to another railroad under a trackage agreement, but we see no way in which a shipper may enjoy such a privilege over the rails of a common carrier, particularly when the compensation for the privilege is not published and the privilege is not open equally to other shippers. Except in one or two cases where the tap line crosses the state boundary line such arrangements are possibly to be regarded as purely local and therefore beyond our control. But they are inherently unlawful, and afford strong evidence that a tap line whose

rails are used in that manner by its proprietary lumber company is a mere plant facility. On the other hand, such an arrangement with a shipper, even though it be purely local and therefore beyond our control, may nevertheless operate as a rebate and be punishable as such under this law when it appears that the concession is made in order to secure the interstate traffic of the shipper. All such arrangements are wrongful and we shall expect them to be discontinued."

The Tap Line Case, 23 I. C. C. Rep. 549, 550.

Upon review by the Commerce Court the test of service and ownership as applied by the Commission was held insufficient, and the cases were further appealed to the Supreme Court of the United States. The latter court declared that the test of whether these railroads are or are not common carriers is not the amount of business they do, nor for whom, but the right of the public to demand and receive service from the tap lines and industrial railroads. The Commission, in its first supplemental Tap Line report, investigated the individual tap lines and determined their status largely from the standpoint of from whom the lines received their traffic. It held that incorporation was not a condition precedent to the right to be a common carrier, but the nature of the transportation service rendered made of the tap line either a plant facility or a common carrier, but it could not be both at the same time. The Commission held in the original Tap Line Case that the fact the rails, locomotives, and cars of an industry have been turned over to an incorporated railroad company, owned and operated by the industry or in its interest, does not divest those appliances of their character as a plant facility if such in fact is their real status. If the rails were laid and the equipment acquired for the use of the industry

as a facility in the process of manufacture and production, and are so used, the fact that some outside traffic may be carried over the same rails does not modify the character of what is done over them for the industry. If in such a case the tracks and equipment are a facility of the plant and are so used in the process of manufacture, what is thus done for the controlling industry cannot be regarded as a service of transportation. A division allowed by a public carrier out of the rate, under such circumstances, is a rebate to the industry. The test is: What is the real relation to the industry by the tap line?

In an earlier case the Commission had held that the mere interposition between the lumber mill and the carrier of a paper railroad corporation that called itself a common carrier and complied with the Act in those respects, but was owned by the mill or its proprietors, did not give legality to the so-called tap-line allowances or meet the requirements of the Commission. In the Yellow Pine cases, the Commission had recognized a different principle with respect to these logging roads in that it had declared them, by reason of their development in size and character of traffic transported, to be legitimately common carriers.

A close analysis of the first Tap-Line report of the Commission shows an undercurrent of suspicion of the motive of making these tap lines common carriers, and the Commission applied its test of service not without an evident perception of a subtle evil behind the cloak of franchisement. The Commission's past experiences with the artifices of deception and evasion by both carrier and shipper, where allowances were involved, undoubtedly caused the Commission to closely search the metamorphosis of a tap line into an incorporated railway for its effect upon the vital elements involved. And the Commission determined each tap line's status as to whether it performed a trans-

portation service or not, holding, under this test, the large majority of the tap lines not to be common carriers.

The Supreme Court of the United States affirmed the holding of the Commerce Court repudiating the test of status applied by the Commission, saying:

"It is insisted that these roads are not carriers because the most of their traffic is in their own logs and lumber and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business, which is the real criterion determinative of its character. This principle has been frequently recognized in the decision of the courts. We need not cite the many state cases in which it has been so held, in view of the fact that the same principle was laid down in the late case of Union Line Co. vs. Chicago & N. W. Ry. Co., 233 U. S. 211. In that case the Supreme Court of Wisconsin sustained the extension of a spur track to reach the quarries and limekilns of a single company as a public use authorizing the exercise of the right of eminent domain, and this court affirmed the judgment. Dealing with the contention that the Wisconsin statute was invalid because it authorized action appropriating property upon the exigency of a private business, this court said (p. 221):

" 'A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But, none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which

are operated under the obligations of public service and are subject to the regulation of public authority. As was said by this court in Hairston vs. Danville & Western Ry. Co., supra (208 U. S. 598): "The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost. There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. See De Camp vs. Hibernia R. R. Co., 47 N. J. Law 43; Chicago, etc., R. R. Co. vs. Porter, 43 Minn. 527; Ulmer vs. Lime Rock R. R. Co., 98 Me. 579; Railway Company vs. Petty, 57 Ark. 359; Dietrich vs. Murdock, 42 Mo. 279; Bedford Quarries R. R. Co. vs. Chicago, etc., R. R. Co., 175 Ind. 303." '

"The Commission has recognized this principle as applicable to tap lines, for in The Central Yellow Pine Association vs. The Vicksburg, Shreveport & Pacific R. R. Co., 10 I. C. C. 193, 199, it said:

" 'While these logging roads are almost or quite without exception mill propositions at the outset, built exclusively for the purpose of transporting logs to the mill, they soon reach a point where they engage in other business to a greater or less extent. As the length of the road increases, as the lumber is taken off and other operations obtain a foothold along the line, various commodities besides lumber are transported, and this business gradually develops until in several cases what was at first a logging road pure and simple has become a common carrier of miscellaneous freight and passengers. Almost all these lines, even where they are run as private enterprises, do more or less outside transportation, and it would be difficult to draw any line of

demarcation between the logging road as such and the logging road which has become a general carrier of freight.'

"This representation, it is contended by the attorney-general of Louisiana, who appears here in behalf of the Louisiana Railroad Commission, is aptly descriptive of the growth and development of railroads in that state.

"Furthermore, these roads are common carriers when tried by the test of organization for that purpose under competent legislation of the state. They are so treated by the public authorities of the state, who insist in this case that they are such and submit in oral discussion and printed briefs cogent arguments to justify that conclusion. They are engaged in carrying for hire the goods of those who see fit to employ them. They are authorized to exercise the right of eminent domain by the state of their incorporation. They were treated and dealt with as common carriers by connecting systems of other carriers, a circumstance to be noticed in determining their true character. United States vs. Union Stock Yards & Transit Co., 226 U. S. 286. They are engaged in transportation as that term is defined in the Commerce Act and described in decisions of this court. Coe vs. Errol, 116 U. S. 517; Covington Stock Yards Co. vs. Keith, 139 U. S. 128; Southern Pa. Term. Co. vs. Interstate Com., 219 U. S. 498; United States vs. Union Stock Yards & Transit Co., supra.

"Applying the principle which we have stated as determinative of the character of these roads and without repeating the facts concerning them, they would seem to fill all the requirements of common carriers so employed, unless the grounds upon which they were determined not to be such by the Commission are adequate to that end. The Commission itself, as to all shippers other than those controlled by the so-called proprietary companies, treated

them as common carriers, for it has ordered the trunk lines to re-establish through routes and joint rates as to such traffic. But, says the government, and it insists that this fact alone might well control the decision, the roads are owned by the persons who also own the timber and mills which they principally serve.

"This fact is not shown to be inconsistent with the laws of the state in which they are organized and operated. On the contrary, the public authorities of that state are here insisting that these companies are common carriers. Congress has not made it illegal for roads thus owned to operate in interstate commerce. While Congress, in enacting the commodities clause amending section 1 of the Act to Regulate Commerce (34 Stat. 584), sought to divorce transportation from production and manufacture and to make transportation a business of and by itself unallied with manufacture and production in which a carrier was itself interested, the debates, which may be resorted to for the purpose of ascertaining the situation which prompted this legislation, show that the situation in some of the states as to the logging industry and transportation was sharply brought to the attention of Congress and led to the exemption from the commodities clause of timber and the manufactured products thereof, thus indicating the intention to permit railroads to haul such lumber and products, although it owned them itself. And that Congress had the constitutional power to enact such exemption was held in United States vs. Delaware & Hudson Co., 213 U. S. 366, 416-7. This declaration of public policy, which is now part of the Commerce Act, cannot be ignored in interpreting the power and authority of the Commission under the Act. The discussion resulting in the action of Congress shows that railroads built and owned by the same persons who own the timber were regarded as essen-

tial to the development of the timber regions in the Southwest, and the necessity of such roads was dwelt upon and set forth with ample illustration by Commissioner Prouty in his concurring opinion in this case.

"As we have said, the Commission, by its order herein, required the trunk lines to re-establish through routes and joint rates as to property to be transported by others than the proprietary owners over the tap lines. This order would of itself create a discrimination against proprietary owners, for lumber products are carried from this territory upon blanket rates applicable to all within its limits. It follows that independent owners would get this blanket rate for the entire haul of their products, while proprietary owners would pay the same rate plus the cost of getting to the trunk line over the tap line. The Commission, by the effect of its order, recognizes that railroads organized and operated as these tap lines are, if owned by others than those who own the timber and mills, would be entitled to be treated as common carriers and to participate in joint rates with other carriers. We think the Commission exceeded its authority when it condemned these roads as a mere attempt to evade the law and to secure rebates and preferences for themselves."

Tap Line Cases, 234 U. S. 1, 58.

Following the decision of the Supreme Court upholding the common carrier status of these railroads, the Commission issued several supplemental reports in conformity with the higher court's ruling.

The Tap Line Case, 35 I. C. C. Rep. 485.
The Tap Line Case, 34 I. C. C. Rep. 116.
The Tap Line Case, 31 I. C. C. Rep. 490.

The Commission, in its supplemental report in the Industrial Railway Case, gave the permission to certain lines

to negotiate for allowances made to the short-line roads.

New York, Pennsylvania and Ohio, long before the Federal body modified its order, and Illinois, since then, have recognized the industrial roads as common carriers entitled to make bargains with the trunk lines for a division of the rates, and, so far as intrastate shipments are concerned, the status of the short lines is the same as it was before the Commission's original report.

The southern states in which there are tap lines recognized their common carrier character as soon as the Commission made its first report, holding that payments to tap lines were illegal because, among other things, many of them were not even incorporated. That statement caused their owners to apply for charters. No objection was made to the incorporation of any of the lines. In fact, Louisiana, in the constitution of 1898, took steps to encourage the construction of such railroads, on the theory that they would tend to develop the resources of the state. The constitution exempted such roads and industrial establishments for the first ten years of their existence. About 1,800 miles of railroads received the benefit of the exemption. So Louisiana, in her intervention in the tap-line cases, alleged and set forth the fact that it was her policy to encourage the development of her resources by allowing the lumber roads to incorporate as common carriers. This state further declared that the lumber roads, by assuming the obligations of common carriers, made it possible for their owners to prevent the development of lumbering industries in competition with their own operations. The lumber roads, having been incorporated to get the benefit of the tax exemption, were forced to carry lumber for any one who could raise money enough to erect a mill and find a market for the lumber.

Missouri, to enable shippers in the southern part of the

city of St. Louis to get their freight to trunk lines and to get a terminal system not under the control of the Terminal Association, encouraged the brewers to incorporate their industrial railroads and assume the status and obligations of common carriers.

When the trunk lines canceled their tariffs showing industrial roads to be connecting carriers, the state commissions of New York, Pennsylvania and Ohio held hearings with regard to the proposed severance of relations between the industrial and trunk lines in which the question as to what constitutes a common carrier was gone into in thorough fashion. The state commissions reached the conclusion that a common carrier is one that offers to carry for hire and assumes the obligations of a common carrier, regardless of the amount of business done or for whom its traffic may be carried.

Such was in substance the decision of the United States Supreme Court when it disposed of the tap-line cases. In nearly every one of its reports the Commission dwelt strongly upon the fact that most of the tonnage carried by the industrial lines was that furnished by the mills of those who also owned or controlled the industrial railroads. The court said, in effect, that the test of whether these railroads are or are not common carriers, is not the amount of business they do, but the right of the public to demand and receive service from them.

So, the test to determine whether or not a particular tap line or industrial railroad is a common carrier and, therefore, subject to the Act to Regulate Commerce, and capable of exercising the rights, duties and obligations of a common carrier, as laid down by the Supreme Court, is the kind of service the public may demand from such industrial or tap lines, irrespective of their ownership or the nature of their principal traffic. And this test must be

applied in the light of the facts involved in each individual case, but with the contention as to proprietary interest vitiated by the court's decision.

See also—

Tap Line Case, 23 I. C. C. Rep. 277, 285, 289, 291, 292.
Tap Line Case, 23 I. C. C. Rep. 549, 561, 650, 651.
Star Grain & Lumber Co. vs. A. T. & S. F. Ry. Co., 17 I. C. C. Rep. 338.
Tap Line Cases, 234 U. S. 1.

Compare—

La. Cent. Lumber Co. vs. C. B. & Q. R. R. Co., 35 I. C. C. Rep. 38, 41.
The Tap Line Case, 35 I. C. C. Rep. 485, 487.
The Tap Line Case, 34 I. C. C. Rep. 116, 118.
Second Industrial Railways Case, 34 I. C. C. Rep. 596, 604.
Rates on Lumber from Southern Points, 34 I. C. C. Rep. 652, 677.
Northbound Rates on Hardwood, 34 I. C. C. Rep. 708, 710.
Northbound Rates on Hardwood, 32 I. C. C. Rep. 521, 529.
The Tap Line Case, 31 I. C. C. Rep. 490, 492, 493.
Industrial Railways Case, 29 I. C. C. Rep. 212, 237.
Campbells Creek Coal Co. vs. A. A. R. R. Co., 29 I. C. C. Rep. 682, 683, 686, 689.
Central Coal & Coke Co. vs. M. & L. R. R. Co., 27 I. C. C. Rep. 40.
Cancellation of Joint Rates, etc., 27 I. C. C. Rep. 353.
Joint Rates with W. W. Ry., 27 I. C. C. Rep. 636.
Blakely So. R. R. Co. vs. A. C. L. R. R. Co., 26 I. C. C. Rep. 344, 350.
B. & G. N. R. R. vs. A. T. & S. F. Ry. Co., 24 I. C. C. Rep. 161.
L. & N. R. R. Co. vs. M. St. P. & S. S. M. Ry. Co., 24 I. C. C. Rep. 639, 643.
C. V. & N. Ry. Co. vs. M. St. P. & S. S. M. Ry. Co., 24 I. C. C. Rep. 634.
McCloud River Lumber Co. vs. S. P. Ry. Co., 24 I. C. C. Rep. 89, 94.
Consolidated Fuel Co. vs. A. T. & S. F. Ry. Co., 24 I. C. C. Rep. 213, 217.

Chippewa Valley & No. Ry. Co. vs. M. St. P. & S. S. M. Ry. Co., 24 I. C. C. Rep. 634.
Stonega Coke & Coal Co. vs. L. & N. R. R. Co., 23 I. C. C. Rep. 17, 23.
Kaul Lumber Co. vs. Cof. Fa. Ry., 20 I. C. C. Rep. 450.
La. Cent. Lumber Co. vs. C. B. & Q. R. R. Co., 19 I. C. C. Rep. 333.
Fathaner Co. vs. St. L. I. M. & S. Ry. Co., 18 I. C. C. Rep. 517, 519.
Crane Iron Works vs. C. R. R. Co. of N. J., 17 I. C. C. Rep. 514, 518, 520.
Central Yellow Pine Assn. vs. Vicksburg S. & P. R. R. Co., 10 I. C. C. Rep. 193.

§ 3. Tap Line Defined by Interstate Commerce Commission.

See Sect. 1 of this chapter, "Tap Line Defined."

§ 4. Tap Line Complying with the Requisites of Common Carrier and the Act to Regulate Commerce.

As soon as the tap line establishes itself as a common carrier, it must recognize its obligations as such by conforming its accounting method to the requirements of the Commission, by filing annual reports and lawful tariffs, by complying with the hours of service law and the safety appliance acts so far as they are applicable, and otherwise fulfilling the obligations and duties imposed by the Act to Regulate Commerce on carriers engaged in interstate commerce.

In the original Tap Line Case the Commission held that any omission of its duties in this regard would be deemed as tending to show that the claim of the tap line to be a common carrier was a mere device to justify allowances or divisions of through rates.

The holding of the Supreme Court simply had the effect of making common carriers of tap lines theretofore declared by the Commission not to be common carriers, and

subject, therefore, to these duties and obligations of the law.

The Tap Line Case, 23 I. C. C. Rep. 277, 295.
The Tap Line Cases, 234 U. S. 1.
The Tap Line Cases, 31 I. C. C. Rep. 490.

See also—

Mfgs. Ry. Co. vs. St. L. I. M. & S. Ry. Co., 28 I. C. C. Rep. 93, 102.
Blakely So. R. R. vs. A. C. L. R. R. Co., 26 I. C. C. Rep. 344, 350.
Act to Regulate Commerce as amended.

§ 5. Tap Line May Not Render Free Transportation.

A tap line that is, in fact, a common carrier engaged in interstate commerce, may not haul the logs to the mill of the proprietary company free of charge.

Tap Line Case, 23 I. C. C. R. 277.

Section 1 of the Act to Regulate Commerce provides that a free service is inherently unlawful, and the tap line as a common carrier is subject to this inhibition.

§ 6. Milling-in-Transit Privilege with Tap Line Must Be Open to All Forests on Trunk Line.

A trunk line may not set up a milling-in-transit privilege with a common carrier tap line by which the lumber rate is extended back through the mill point to the tree in the forest, unless it pursues the same course with respect to forests on its own line.

Tap Line Case, 23 I. C. C. R. 277.

§ 7. Industrial Railroads Defined by Interstate Commerce Commission.

Industrial railroads are classified by the Commission into six groups: (1) Those industrial lines which have a

very general merchandise and commodity traffic aside from the traffic of the controlling industries, which are of the trunk line type and perform hauls of from 11 to 380 miles; (2) those lines extending from lumber mills to junctions of the trunk line carriers, the ownership or control of which is vested in the lumber companies which they serve, such lines coming within the ruling of the Supreme Court in the Tap Line cases, supra; (3) incorporated industrial lines of a plant facility nature performing an internal plant switching service; (4) those lines resembling the lumber tap lines, but which haul commodities other than lumber, and in some instances fall within the direct inhibition of the commodities clause of the Act; (5) those industrial plant tracks, which, under no conceivable conditions can be considered as having any common-carrier characteristics; and (6) those industrial plant tracks which are neither owned nor operated by common carriers and are not dedicated to public use, the ownership and right of use being in the controlling industries which operate them.

The lines in the second group in all respects fall within the principles laid down by the Supreme Court in the Tap Line cases, supra, except that in that case the tap lines were all located within the producing territory from which the carriers applied a blanket rate to all important markets, whereas in the case of this group of lines no large blanket exists and the rates are graded with some regard to distance. On short-haul traffic to many markets in the territory involved, some recognition was given to the two-line hauls involved from points on the tap lines.

As to those in the third, group the only essential difference is that the lines included have been incorporated and hold themselves to be common carriers. In most instances the incorporated industrial line was first constructed as a system of plant tracks, and in many instances the tracks

are still owned by the industry and leased to the incorporated railroad. Usually the plant is located contiguous to the rails of a trunk line. In all of these instances there should be considered very carefully the test applied by the Supreme Court in the Tap Line cases, supra, regarding the bona fide character of the common carrier—that it is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character.

If a railroad within this group is a common carrier and access to its rails may be had by the public, there is also to be considered whether such a line should be sustained by the shippers it serves or whether the expense of maintenance, operation, and interest on the money invested are to be paid by that part of the public which receives no public service or public use from it. In other words, it may well be that there should be a charge in addition to the line-haul rate for the service upon the tracks of some of the industrial lines within this group.

As appeared in the Tap Line Case, the history of the lines in the fourth group shows instances in which a system of plant tracks was constructed to serve an industry located immediately contiguous to trunk line rails. Because of various considerations, including a desire for an adequate car supply and a development of competition which could be used as a weapon to obtain divisions of the joint rate for the industrial line, the plant tracks were incorporated and connected with another trunk line located at a distance from the plant. The industrial line having thus developed a line haul, and the trunk line not contiguous to the plant being desirous of getting the traffic of the plant, it afforded divisions of the local rate to the industrial line, and thus extended its facilities to the plant. Under such

conditions the trunk line which had formerly served the plant lost the traffic, or in order to retain it, afforded the same division as did the line at a distance from the plant. The remuneration paid by the distant trunk line may not have been excessive for the service performed by the industrial line, but as applied to the short distance movement of cars to and from the contiguous trunk line, the same measure of remuneration gave to the industrial line earnings which amounted to substantial returns on the investment, not only in the tracks and facilities outside of the plant, but also in the purely plant tracks, and sometimes paid for a substantial part of the actual industrial operations. A situation somewhat similar was before the Commission in Blakeley Southern R. R. Co. vs. A. C. L. R. R. Co., 26 I. C. C. Rep. 344, wherein there was pointed out the waste of transportation involved in movements to the more distant trunk line. In the view of the Commission, it would seem that the proper method to pursue in making the rates to such plants, would be to add to the junction point rate, for the service extended to the plant from the more distant line, and cancel joint arrangements with the contiguous line. The industrial road should not receive from the distant trunk line connection, any compensation either as a division or allowance, which exceeds the amount added to the junction point rate. Thus would be preserved the earlier rate adjustment, the relation between the rates applicable over the competing trunk lines would be equalized, the revenues of the trunk lines would be conserved, and the general rate-paying public would not be burdened with allowances and special services for particular shippers.

In this group instances also appear wherein the industrial line is a bona fide common carrier and joint rates have been properly made with it, but it is in the manner in

which the joint rates are constructed that discrimination occurs. For example, in one instance a plant was located adjoining the rails of the trunk line. For reasons of industrial economy it had a system of plant tracks and performed the switching thereon with its own power without compensation from the trunk line. The topography of the country was such that the plant could not be enlarged at the particular point where it had been located and it was necessary to move farther up the valley to find space for a new and larger development. Between the original plant and the new plant there was located an independently owned common-carrier railroad. Joint rates had been made with this independent line on the basis of the combination of local rates to and from the junction point. When the new plant was built the independent line was acquired by the industry. The joint rates on traffic of independent shippers were continued in the same manner and measure as theretofore, but, at that time, there were published joint rates applicable to the traffic of the controlling industry on the basis of the junction point rate, giving divisions out of it to the industrially owned line. It was by measures such as these that the trunk lines unnecessarily depleted their revenues. There can be no justification for giving a division out of the junction point rate on the traffic of the controlling industry, while making rates to the independent shippers on the basis of the combination of local rates over the junction. The conditions of the fifth group are that an industry has plant tracks which could, under no conceivable conditions, be considered as having any common-carrier characteristics. In order to give to them such a status, a railroad is incorporated, the tracks of the plant are leased to it, and the trunk line grants trackage rights and even leases its rails to the industrially owned railroad incorporation. Thereupon the in-

dustrial railroad publishes tariffs, files them with the Commission, makes reports, and as a matter of form assumes the appearance of a common carrier subject to the Act, and the trunk line affords it divisions out of the rate applicable to the locality, for the same service which the industry has previously performed without compensation. The shipper, through its incorporated railroad, is thus afforded advantages which are denied to other shippers having a smaller volume of traffic. For a trunk line carrier to offer its facilities by lease or trackage rights, giving an undue advantage to a single shipper, is unquestionably such a device as is condemned by the Act.

The Commission found that the history of one of these lines showed it to have had an ephemeral existence. For a time it held itself out as an interstate common carrier. When embarrassments occurred from accepting the obligations of such a status, it withdrew its reports and tariffs from files of the Commission and asserted that it was not within the jurisdiction of the Commission. When circumstances made it appear that it would be of advantage to accept again the obligations of an interstate carrier and receive the benefits from that status, it again filed its tariffs and reports and submitted itself to the jurisdiction of the Commission.

The lines in the sixth group present the same question which was considered in the General Electric Co. and Solvay Process Co. cases, supra, and it is not necessary to enlarge upon it here. These cases illustrate the passing of the necessity for that provision of section 15 under which shippers may be compensated by the trunk lines for their facilities used in the handling of their own shipments. This legislative measure was enacted to give the Commission a means of eliminating certain unjust discriminations. The gradual elimination of discriminatory

practices by other processes, leaves this provision of the law to be used as a cloak for various payments which but for it would be looked upon as rebates.

In a physical sense, the industrial railroad may be generally defined as a short line of railroad constructed primarily to serve the particular plant or industry in the general interest of which it is owned and operated. It consists of the tracks connecting the various factories, warehouses and other buildings of the industry with one another, and ordinarily has a connection with one or more adjacent trunk lines by means of a track leading from the plant to their rights-of-way. It serves the industry by receiving its inbound shipments of raw materials from the trunk lines at agreed interchange points, distributing them among the various buildings according to the requirements of the manufacturing operations, and by taking its finished products from the plant to the trunk lines. It is also often in a position to effect all the necessary movements of materials and partially finished products from building to building within the plant. The rails, tracks, and locomotives are frequently operated as a bureau or department of the industry.

In most instances where the status of common carrier has been sought by these originally plant track and switching systems, incorporation has followed and the trackage system and operating agencies leased to the incorporated railroad.

Second Industrial Railways Case, 34 I. C. C. Rep. 596, 604, 605, 607, 608.
Tap Line Case, 31 I. C. C. Rep. 490.
Tap Line Cases, 234 U. S. 1, 58.

Compare—

Industrial Railways Case, 29 I. C. C. Rep. 212.

Tap Line Case, 23 I. C. C. Rep. 277.
Tap Line Case, 23 I. C. C. Rep. 549.

§ 8. No Distinction Between Tap Line and Industrial Railroad in Granting of Allowances or Divisions of Rates.

As a legal entity capable of assuming and discharging the obligations and duties of a common carrier subject to the Act to Regulate Commerce, the physical distinction between a tap line and an industrial railroad is ephemeral, so far as such difference affects the granting of an allowance from or division of the rate by the trunk line. In this respect arriving at the allowance or division of the rate to be accorded the tap line or industrial railroad is a process of bargaining between such carriers, controlled only by the inhibitions of the law against unreasonable rates, undue discrimination and rebating.

Second Industrial Railways Case, 34 I. C. C. Rep. 596.

§ 9. Allowances Permitted to Tap Lines and Industrial Railroads.

See Chap. XI, this volume, Sec. 3.

§ 10. Regulations of Interstate Commerce Commission Governing Tap Lines and Industrial Railroads.

As common carriers, tap lines and industrial railroads are subject to all the provisions of the Act to Regulate Commerce, and of all other acts supplementary thereto and amendatory thereof, and to all the requirements of the administrative regulations of the Interstate Commerce Commission governing common carriers subject to the Act.

See "Interstate Commerce Law."

CHAPTER X.

ALLOWANCES PERMITTED BY LAW.

§ 1. General Nature of Allowances.
§ 2. Jurisdiction and Authority of the Interstate Commerce Commission Over Allowances to Shippers.
§ 3. Allowances Must be Published in Tariffs.
§ 4. Allowances for Services Rendered and Facilities Furnished by Shipper.
§ 5. Allowances for Stakes, Racks, and Blocks, Used on Flat and Gondola Cars.
§ 6. Allowances for Grain Doors.
§ 7. Lining Cattle Cars for Shipments of Machinery and Allowances Therefor.
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§ 10. Allowances for Shrinkage of Weights in Transit.
§ 11. Allowances for Services Rendered and Facilities Furnished by Shippers in Receipt and Delivery of Shipments.
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§ 13. Allowances for Transfers.

CHAPTER X.

ALLOWANCES PERMITTED BY LAW.

§ 1. General Nature of Allowances.

The only lawful allowances that may be made to shippers of interstate freight are for services rendered or facilities furnished by them in connection with transportation, after the carrier's duty to receive and transport the shipment has begun.

An allowance, as contemplated by the Act to Regulate Commerce, is a reasonable compensation which the carrier may allow or credit to the shipper, for some service performed or facility furnished by the shipper which, under the law, the shipper could have required the carrier to render or supply as part of the transportation service. The allowance may be effected by a specific sum paid, or by credit against freight charges, or by weight deductions, or by mileage credits in the case of private cars, or it may be included in the rate charged such shipper. The test which determines an allowance from a rebate is the reasonableness of the compensation allowed for that service or facility which it is the carrier's duty to furnish. It is not a rebate when the allowance does not exceed the actual cost of such service or facility.

Allowances may be made subjects of abuse and discrimination in the form of rebates and deviations from the published rate, and are looked upon by the Commission

with suspicion, it being the principle of that body that the cost of such services or facilities furnished by the shipper for which lawful allowances may be made, should be taken care of in the rate.

Ordinarily allowances are made for dunnage, leakage, shrinkage, compressing, grain doors, elevation of grain, lighterage, staking, cooperage, lining of cars, spotting cars, transferring, etc.

Even though the allowance is a lawful one, it must be made without undue discrimination or prejudice.

It is the evident purpose of the fifteenth section of the amended Act to authorize just and reasonable compensation to the owner of property transported, when he renders a service connected with, or furnishes a facility used in the transportation.

Sec. 15, Act to Regulate Commerce as amended.
Mfrs. Ry. Co. vs. St. L. I. M. & S. Ry. Co., 28 I. C. C. Rep. 93, 101.
Southwest Missouri Millers' Club vs. St. L. & S. R. R. R. Co., 26 I. C. C. Rep. 245, 249, 252, 253.
The Tap Line Case, 23 I. C. C. Rep. 277, 295.
The Tap Line Case, 23 I. C. C. Rep. 549.
Federal Sugar Refining Co. vs. B. & O. R. R. Co., 17 I. C. C. Rep. 40, 48.
Crane R. R. Co. vs. P. & R. Ry. Co., 15 I. C. C. Re. 248, 253.
In the Matter of Allowances for the Transfer of Sugar, 14 I. C. C. Rep. 619, 627.
General Electric Co. vs. N. Y. C. & H. R. R. R., 14 I. C. C. Rep. 237, 242.

See also—

Best Co. vs. G. N. Ry. Co., 33 I. C. C. Rep. 1, 3.
American Sugar Refining Co. vs. D. L. & W. Ry. Co., 200 Fed. Rep. 652.

§ 2. Jurisdiction and Authority of the Interstate Commerce Commission Over Allowances to Shippers.

The Interstate Commerce Commission has jurisdiction to inquire into the lawfulness of allowances made to shippers by carriers, and it may forbid carriers from paying or granting allowances to avoid future violations of the law. If the owner of property transported under the Act, directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality or facility used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality or facility so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as other orders provided for in section 15 of the Act.

It is not, however, settled law that the Commission can require allowance to be made by the carrier for services performed by shippers, any more than it can require a trunk line to absorb the published rate of a terminal carrier. For it has long been established that the carrier has the right to itself to provide all facilities connected with the transportation service required of it by law.

Sec. 15, Act to Regulate Commerce as amended.
U. P. R. R. Co. vs. Updike Grain Co., 22 U. S. 215, 218.
Mfrs. Ry. Co. vs. St. L. I. M. & S. Ry. Co, 28 I. C. C. Rep. 93, 101.
Sterling & Son vs. M. C. R. R. Co., 21 I. C. C. Rep. 451, 454.
Mer. Des. Storage Co. vs. I. C. R. R. Co., 17 I. C. C. Rep. 98, 106.
In re Allowances for Transfer of Sugar, 14 I. C. C. Rep. 619, 627.
General Electric Co. vs. N. Y. C. & H. R. R. R. Co., 14 I. C. C. Rep. 237, 242.

Traffic Bureau Mer. Exchange vs. C. B. & Q. R. R. Co., 14 I. C. C. Rep. 317, 330.
Mitchell Coal Coke Co. vs. P. R. R. Co., 181 Fed. Rep. 403, 410.
Peavey & Co. vs. U. P. R. R. Co., 176 Fed. Rep. 409, 410.

§ 3. Allowances Must Be Published in Tariffs.

The tariffs required by the Act to be filed with the Commission must show all privileges and facilities granted or allowed, and also all rules and regulations which in any wise change or affect the rates or the value of the service rendered to the passenger or shipper, and the carriers are further forbidden to extend to any shipper or person any privileges or facilities except such as are specified in their tariffs.

Act to Reg. Com., sec. 6.

The effect of this mandate of the Act is to render any unpublished allowance a rebate.

Whatever charges are made, whatever services are performed, and whatever privileges are allowed by carriers, must be stated separately in the schedules filed with the Commission.

Rules Governing Transportation of Potatoes, 34 I. C. C. Rep. 255, 256.
Anderson, Clayton & Co. vs. C. R. I. P. Ry. Co., 18 I. C. C. Rep. 340, 350.
Crosby & Meyers vs. Goodrich Transit Co., 17 I. C. C. Rep. 175, 176.
Ames. Brooks Co. vs. Rutland R. R. Co., 16 I. C. C. Rep. 479, 480, 481.
General Electric Co. vs. N. Y. C. & H. R. R. R. Co., 14 I. C. C. Rep. 237, 242.
Victor Fuel Co. vs. A. T. & S. F. Ry. Co., 14 I. C. C. Rep. 119, 120.
I. C. C. Confr. Rulings Bull. No. 6, Rulings Nos. 78, 132, 292, 360.

§ 4. Allowances for Services Rendered and Facilities Furnished by Shipper.

Allowances may lawfully only be made to shippers for some service rendered or facility furnished by a shipper which is a part of the transportation service of the carrier and which under the law the shipper may demand of the carrier. (See Sect. 1, this chapter, "General Nature of Allowances.")

§ 5. Allowances for Stakes, Racks, and Blocks, Used on Flat and Gondola Cars.

The Master Car Builders' Association prescribes rules for loading lumber and other traffic on open cars, and directions for staking and binding the same. From time to time these rules and directions have been modified and changed to meet new conditions and those now in force are presumably such as experience and prudence have dictated. These rules, however, have no mandatory force, and they are not strictly observed by all railroad systems. In actual practice, loading and staking must be done in a manner satisfactory to inspectors of each road, and where delivery is made by one road to another the loading and staking must be approved by the inspectors of the receiving road.

In the country at large, it is estimated that about 60 per cent of lumber shipments is made in box cars, and it appears that from two-fifths to one-half of the remainder might be so shipped. Box cars are generally used except in cases where the shipper or consignee orders otherwise, or where there is a shortage of box cars, or where shipments are of such a character that they can not be loaded in box cars. Some shippers prefer open cars because they can be loaded at less expense than box cars, and for like reason, that they can be unloaded more conveniently and at less expense, consignees frequently request that shipments be

made to them on open cars. Also, open cars carry more lumber inasmuch as they can be loaded to their marked capacity, which generally exceeds the space capacity of box cars, and this in itself is an inducement to shippers to use open cars in filling orders for carload shipments of lumber.

Shipments of lumber include bark, cord wood, ties, lath, telephone and telegraph poles, logs, large-dimension timber, poles, and logs requiring more than one car, light dressed and finished lumber, etc. Each separate carload of these different articles, when open cars are used, requires special loading, staking, and binding to insure safe carriage. Many kinds of lumber are frequently offered for shipment by one producer at a given point, or may be shipped by a number of producers in the same locality. As a general rule there is no uniformity in the character of shipments from any particular section of the country. That is to say, logs and dimension stuff do not originate in one section and sawed and dressed lumber in another region, but each producing territory furnishes a variety of lumber shipments. A particular mill may ship only dressed and dried lumber, but a mill nearby may ship rough lumber and large-dimension timbers. Requests of shippers for cars in most instances depend upon the demand at receiving and consuming markets, and therefore conditions with respect to shipments vary greatly at different producing and shipping points.

The cost of staking varies with each region of production, with different parts of the same region, and with different and adjoining shippers. The cost depends upon where the loading is done, the character of lumber used for staking, and the care with which the individual shipper loads and stakes his shipments. Where loading is done at mills in forests, saplings and waste stuff are generally

used for stakes and binders, and the cost in many cases is merely nominal. At points of distribution in interior cities far removed from sources of production, the cost is considerable.

It has been estimated before the Commission that the cost of staking a carload of lumber amounts to $3.50 per car, but the Commission considered this estimate too high when all shipments are taken into account.

Stakes and binders for the most part are temporary equipment and not often used for more than one shipment. It does occur at interior distribution points, where lumber is received and reshipped in carloads, that stakes and binders are preserved and used more than once, but as a rule they are not used a second time, and are sold for firewood or otherwise disposed of at destination.

Gondola and flat cars are used extensively to transport many other commodities, which are loaded, staked, and blocked by and at the expense of shippers. These commodities include iron pipe and tubes, structural iron and steel, vitrified pipe, cars, engines, boilers, dynamos, pumps, farm machinery, and many other lengthy or bulky articles not requiring protection from the atmosphere. Each of the above articles requires, to some extent, special equipment, consisting of racks, stakes, binders, and blocks, to hold the shipments in place during transit, and the expense of this blocking and staking in many instances is much greater than that required for shipments of lumber. Shipments of iron tubing, dynamos, electrical supplies, and farm machinery are very extensive, exceeding in volume on some roads those of lumber.

Gondola cars made of steel, of special type and large capacity, are used to transport coal and are mainly provided for that traffic. Cars fitted with racks for exclusive use in making coke shipments are supplied by some rail-

roads, but they are not in general use; they are confined for the most part to the coke-producing regions where the hauls are comparatively short. Stock cars are used extensively in transporting coke. Gondola cars of ordinary type are largely used to transport coal, ores, brick, and like commodities which do not deteriorate from exposure.

Experiments were made by the carriers in different parts of the country late in 1906 and in 1907 with patented steel stakes designed to be permanently attached to open cars for lumber shipments. A large number of such stakes were presented to a committee chosen for the purpose by carriers and lumber shippers, and two were selected to be put into service in order to test their efficiency. These stakes are ingeniously arranged, so that they can be lengthened or shortened as shipments require, and when not in use can be laid down at the sides of the cars. At various times in years past the carriers have tried other types of steel stakes but not with success. The cost of equipping cars with the permanent stakes put into experimental service on several roads varied according to the estimates, from $40 to $60 per car. It is claimed by the carriers that no permanent stake has yet been invented which is practically usable for the varied shipments made on open cars; that the same stake would not meet the needs of the greatly varying kinds of lumber, including timber and logs; and that stakes suitable for holding lumber would be more or less in the way and liable to be broken or bent in loading other traffic. It is also claimed that the percentage of open cars used for lumber shipments is comparatively small; that it is impracticable to set apart a portion of the open cars to be used for lumber traffic; and that to equip all open cars with permanent stakes, in order to provide for this commodity, would therefore involve a disproportionate expense to the carrier

besides lessening in some degree the usefulness of open cars for other traffic. Eight steel stakes would weigh from 750 to 1,200 pounds, and the carriage of that additional dead weight upon open cars, whether used for lumber shipments or not, is an item to be considered in connection with their adoption as permanent car equipment. Carriers generally claim these steel stakes have proven valueless in practical use for shipments of lumber, while shippers pronounce them in many instances a complete success when subjected to proper tests.

The Commission, in deciding that the regulations of the carriers requiring shippers of lumber on open cars to stake and secure the loads for safe carriage, were not unjust or unreasonable, said:

"Ever since the inception of railroad transportation shippers have, generally speaking, loaded and their consignees have unloaded carload freight. This practice or custom arose naturally because it was the easiest, most economical, and satisfactory way of doing the business. It is practically out of the question for railroads to provide men to load and unload carload freight at all points in the country. The shipper can load more satisfactorily and economically than anyone else. He is able to possess himself of effective appliances, where they can be used, and to employ skilled men to properly load all carload traffic, whether shipped in closed or on open cars. For the same reason consignees are the best fitted to unload shipments. For more than fifty years the loading by consignor and unloading by consignee has been a recognized rule of carload transportation, and this rule extends to and includes commodities which yield to carriers the larger part of their revenue. With this custom, and as properly a part of it, there has always existed another custom, which is that shippers are required to secure loads for safe carriage.

Because the shipper does the loading he is best situated to fasten the load upon the car. He has the facilities and men at hand and can do the work more satisfactorily and economically than anyone else. Staking the load is in reality a part of the operation of loading, and in the case of lumber it appears that as a practical matter at least one side of the car must be staked before the load can be placed. The custom of staking the load by the shipper dates from no later period than the custom of loading the shipment by him. The work of loading and staking is not confined to shipments of lumber, but extends to and includes shipments of a great variety of commodities, which, because of their nature and character, must be shipped on flat or gondola cars. It seems that the staking of lumber is done more easily and at less expense than is the case with many other commodities shipped under similar conditions.

"Transportation by railroad has grown with the expense of business generally and now embraces a vast number of commodities that differ not only in kind but also in shape and size. Even the same article is frequently shipped in different forms which require different modes of handling. The evidence in these cases shows that no one type of car or equipment would be serviceable for all kinds of lumber shipments. Indeed, it is manifest that equipment suitable to hold poles 60 to 80 feet in length upon cars for safe conveyance would not be serviceable for a shipment of cordwood, and that which might be used to hold bark in place would be ineffectual to hold a load of logs or large-dimension timber. The loader in the case of a shipment of cordwood is required to furnish sixteen or eighteen stakes from 8 to 12 feet in length, but in the case of a shipment of logs only eight stakes 3 or 4 feet long. The stakes and binders must be made to fit the load, since the

load will not often fit any particular set of stakes. * * *"

National Lumber Dealers' Assn. vs. A. C. L. R. R. Co., 14 I. C. C. Rep. 154, 155.

The rule now in effect in Official, Southern and Western Classification territories is to the effect that an allowance of 500 pounds will be made for racks, stakes and blocks furnished by shippers on flat gondola cars loaded with freight requiring their use. Generally speaking, stakes and binders for a single car average about that amount in weight.

Both the Official and Western Classification schedules have withdrawn the allowance of 500 pounds for dunnage in box cars.

Shands vs. S. A. L. Ry. Co., 34 I. C. C. Rep. 214, 215.
Dunnage Allowances, 30 I. C. C. Rep. 538, 546.
New York Shippers' Protective Assn. vs. N. Y. C. & H. R. R. Co., 30 I. C. C. Rep. 437, 438.
Southwestern Millers' Club vs. St. L. & S. F. R. R. Co., 26 I. C. C. Rep. 245, 251, 252.
Western Classification Case, 25 I. C. C. Rep. 442, 495.
Duluth Log Co. vs. M. & I. R. Co., 15 I. C. C. Rep. 627.
Kaye & Carter Lbr. Co. vs. C. M. & St. P. R. R. Co., 14 I. C. C. Rep. 604.

See also—

Deeves Lbr. Co. vs. C. & N. W. R. Co., 19 I. C. C. R. 482, 483.
I. C. C. Confr. Rulings Bull. No. 6, Ruling No 292.

§ 6. Allowances for Grain Doors.

A carrier may not lawfully reimburse shippers for the expenses incurred in attaching grain doors to box cars unless expressly so provided in its tariffs. There is a

material difference between the furnishing of services or facilities to carriers by one who is a shipper and the furnishing of the same facilities or services by one who is not a shipper.

The Commission had decided that its ruling above mentioned and the requirements of the law thereunder will, for the present at least, be satisfied if the carriers who propose to pay shippers for grain doors furnished by shippers, provide in their tariffs that where grain doors are necessary and are furnished by the shipper the carriers will pay the actual cost of such doors, with stated maximum allowances per grain door and per car.

Such maximum allowances per door and per car must be reasonable, and where the carrier pays for such doors on the basis of actual cost, certified statement from shipper, verified by the carrier's agent, as to the number of doors furnished and the cars to which attached, should in every instance be required.

See Confr. Rulings Bull. No. 6, Rulings Nos. 19, 132, 267 and 292.
See Confr. Rulings Bull. No. 6, Ruling No. 78.

Where a carrier has established a tariff provision in conformity with the Commission's rule with respect to the payment by carriers of the cost of grain doors, and it appears that prior to the publication of such a tariff it had been the practice of the carrier to pay for grain doors furnished by shippers, the Commission held that applications may be made on the special reparation docket for authority to refund on the basis of the tariff provision for grain doors furnished, within six months prior to the effective date of the tariff rule.

I. C. C. Confr. Rulings Bull. Rulings Nos. 19, 78, 132, 267 and 292.

Box cars are fitted with inside doors for shipments of grain, and these doors, when not in use, are fastened inside the cars by chains. If they are broken or lost shippers supply them and are usually allowed 40 cents for each one thus furnished. These inside doors are used to prevent the grain from leaking or wasting through the more loosely hung outside doors of the cars and as a protection against rain and snow. They are all of the same general design and of practically uniform cost.

Natl. Lbr. Dlrs.' Assn. et al. vs. A. C. L. R. Co. et al., 14 I. C. C. R. 154, 158.

See also—

Balfour, Guthrie & Co. vs. O. W. R. R. & N. Co., 21 I. C. C. Rep. 539, 540.

§ 7. Lining Cattle Cars for Shipments of Machinery and Allowances Therefor.

Not having box cars available for the movement of machinery, cattle cars were supplied at the request of the shipper, who lined them with tar paper and felt in order to protect his shipments from weather conditions. Upon inquiry to the Commission, it was held that in the absence of tariff authority the carrier could not lawfully reimburse the shipper for the expense so incurred.

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 19.

The converse of this rule would be that, with proper tariff authority, the shipper could be reimbursed for the actual cost of such car fitting.

§ 8. Allowances for Floor Racks in Refrigerator Cars.

Certain carriers filed tariffs providing that when refrigerator cars without floor racks are set for loading, and

shippers are required to furnish floor racks to protect the freight loaded, allowances will be made to equal the cost of the racks but not to exceed $2.50 per car. On the question of the lawfulness of such tariff provision, the Commission held that the principle involved is the same as that relating to grain doors furnished by shippers. (See Confr. Rules Nos. 19, 78 and 132.)

I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 292.

See also—

I. C. C. Confr. Rulings Bull. No. 6, Rulings Nos. 19, 78 and 132.

§ 9. Allowances for Private Cars.

It is the duty of the carrier to supply the rolling stock for the freight it offers or proposes to carry, and if the diversities and peculiarities of the traffic are such that this is not always practical and the consignors are allowed to supply it themselves, it is just and proper that the owner of such equipment be given a reasonable allowance for the use thereof. An allowance of a certain amount per mile is usually made for each mile the car moves over the roads, either under load or empty, such allowance usually being ¾ of a cent per mile.

Rules Governing Transportation of Potatoes, 34 I. C. C. Rep. 255, 256.
Rice vs. L. & N. R. R. Co. et al., 1 I. C. C. R. 503, 1 I. C. R. 722.
Scofield vs. L. S. & M. S. R. Co., 2 I. C. C. R. 90, 2 I. C. R. 67.

§ 10. Allowances for Shrinkage of Weights in Transit.

It has been the practice in the past to grant allowances on shipments of live stock and certain other special freight,

but the Commission questioned whether any good purpose was accomplished thereby. In passing upon a contention for an allowance for the shrinking of bananas in transit, the Commission said:

"As to the second contention, that an allowance should be made for the shrinking of the bananas, we can not sustain the position of the complainants. It is true that an allowance is made in a shipment of live stock and some other freight, but whether the practice accomplishes any good purpose is questionable. The shrinkage of freight in transit is one of the elements which should be considered in the fixing of the rate. At most the shrinkage is a matter of estimation. And it appears from the testimony on the record that bananas on the road four days shrink almost twice as much as they do when on the road only two days. To be accurate, the shrinkage would be different at different points of destination based upon the distance from the point of origin."

Topeka Banana Dealers' Assn. vs. St. L. & S. F. R. Co. et al., 13 I. C. C. R. 620, 626.

See also—

K. C. Live Stock Exch. vs. A. T. & S. F. Ry. Co., 34 I. C. C. Rep. 423, 429.
Southwest Missouri Millers' Club vs. St. L. & S. F. R. R. Co., 26 I. C. C. Rep. 245, 246, 249.

§ 11. Allowances for Services Rendered and Facilities Furnished by Shippers in Receipt and Delivery of Shipments.

The delivery to and receipt from common carriers of shipments are duties legally resting upon the shippers to be performed by themselves and at their own expense, nor can they compel the carriers to perform such obliga-

tions for them. Common carriers are under no duty to extend their transportation obligations with the extension of great industrial plants to accept and deliver cars within the inclosures over a network of interior switches and tracks constructed as plant facilities to meet the requirements of the industry. In such a case the shipper does nothing within its plant inclosure which it can lawfully call upon the carriers to do for it.

That service or facility afforded by the shipper which is part of the carrier's service—something done by the shipper which the carrier ought to do as a part of its contract of transportation—is what the carrier may allow a reasonable compensation for.

Thus, where a manufacturing plant has so increased in size as to require within the plant inclosure twelve miles of broad-gauge switching tracks and seven miles of narrow-gauge electric tracks for the prompt, successful and economical operation of the industry, and with its own motors, engines and crews does a vast amount of purely internal switching, which would be seriously interfered with by the switching engines of the railroads if permitted access to the plant, and has on that account assumed charge also of the in-and-out switching and spotting theretofore done by the railroads, it is not entitled to compensation from the carriers to cover the cost of the movements of loaded and empty cars between the interchange tracks and certain shops, foundries and other buildings within the inclosure. The carriers can not be called upon as a part of their contract of transportation to make deliveries through a network of interior switching tracks constructed as plant facilities to meet the necessities of the industry.

[6] Genl. Elec. Co. vs. N. Y. C. & H. R. R. R. Co. et al., 14 I. C. C. R. 237, 244.

Solvay Process Co. vs. D. L. & W. R. R. Co. et al., 14 I. C. C. R. 246.

It is not a part of the carriers' duty to bear the expense of transferring goods from the shipper to the carrier. For the carriers to undertake to compensate shippers for performing services which the shippers are legally bound to do for themselves is to violate the provision of the Act to Regulate Commerce.

In the Matter of Allowances for the Transfer of Sugar, 14 I. C. C. R. 619.

See also—

Rates for Transp. Anthracite Coal, 35 I. C. C. Rep. 240, 241, 243.
Express Rates, 35 I. C. C. Rep. 3, 4, 10.
The Tap Line Case, 34 I. C. C. Rep. 116, 117.
Second Industrial Railways Case, 32 I. C. C. Rep. 129, 133.
Lumber Rates on So. Ry., 31 I. C. C. Rep. 244, 247, 248, 254.
Tap Line Case, 31 I. C. C. Rep. 490, 493.

Compare—

A. T. & S. F. Ry. Co. vs. K. C. Stock Yards Co., 33 I. C. C. Rep. 92, 98.
In re Muncie & Western R. R. Co., 30 I. C. C. Rep. 434, 435.
Industrial Railways Case, 29 I. C. C. Rep. 212, 237.

§ 12. Allowances for Use of Shipper's Docks and Facilities.

In the case of International Salt Company of Illinois vs. Genesee & Wyoming R. R. Co., 20 I. C. C. R. 530, 533, 534, the International Salt Company of Illinois was shown to be a subsidiary corporation of the International Salt Company of New Jersey, which in turn owned the Retsof Mining Company, engaged in the production of salt at Retsof, N. Y., and in close relationship with the defendant

Genesee & Wyoming Railroad Company. The International Salt Company of Illinois owned the docks and facilities at Chicago for unloading cargoes of bulk salt from the vessels at that port. For the use of the docks and facilities at Chicago and for the labor involved in unloading and storing bulk salt, the boat-line paid an allowance of 40 cents per net ton to the International Salt Company of Illinois. The question of this allowance was involved in the adjustment of the all-rail rates to Chicago, because storage at Chicago was a privilege attached to the lake rate, and was of sufficient advantage and value to the International Salt Company of Illinois, together with the rate itself, to divert a substantial part of the through tonnage to that route. It cost $2.25 per net ton, which is equivalent to 11¼ cents per 100 pounds, to move salt by the lake-and-rail route from Retsof to Chicago loaded on the cars at the dock, and $2.60 per ton, or 13 cents per 100 pounds, when delivered at the Union Stock Yards. The factors entering into the latter through charge were as follows:

	Per net ton
Rail rate, Retsof to Buffalo	$0.80
Handling charge to boat and Buffalo	.25
Water rate, Michigan, Indiana & Illinois Line, to Chicago, including unloading, storage for not exceeding eight months, and insurance	1.10
Handling from docks into cars at Chicago	.10
Switching charge from docks to stockyards, approximately	.35
Total	$2.60

The Commission, in passing upon the relative adjustment of the all-rail and the lake-and-rail rates on bulk salt, said:

"The defendants insist that the lake-and-rail rate that

forces down their all-rail charge on coarse salt in bulk to 10 cents is really only $2.10 per net ton. In arriving at this figure they use the same factors that were given by the chief witness for the complainants, with the exception of the $1.10 rate of the Michigan, Indiana & Illinois Line. This they discard in favor of a charge of 45 cents which they contend represents the cost of chartering tramp steamers for the movement of such salt from the docks at Buffalo to the docks at Chicago; and they add 25 cents to cover the cost of handling from the boat into the cars at Chicago. It will be observed that 45 cents is the charge paid by the Michigan, Indiana & Illinois Line when chartering the boats of the Retsof Mining Company, as heretofore stated. The estimated charge of $2.10 a ton for lake-and-rail movements is equivalent to 10½ cents per 100 pounds and covers the transportation of the salt from the mines at Retsof to the Union Stock Yards at Chicago. The defendants contend that it fairly represents the reasonable cost of that transportation. But even accepting the complainants' figures as correct, the defendants suggest that the cost of the water movement is but 11¼ cents per 100 pounds, which includes free storage for an extended period at Chicago and other privileges, as against their standard 14-cent rate basis to Chicago, which does not include any storage.

"Moreover, in giving the figures as to the cost of the rail-and-lake movement, the complainants' witnesses have overlooked a through rate of 6¼ cents per 100 pounds to the Union Stock Yards from Buffalo, applying only over the Michigan, Indiana & Illinois Line, in connection with switching carriers at Chicago. This rate is published in a committee tariff and is equivalent to $1.25 per ton. Using it in connection with the 80-cent rate from Retsof to Buffalo and the overhead charge at that point, the combination

rail-and-water rate from Retsof to Union Stock Yards would be $2.30 per ton, or approximately 11½ cents per 100 pounds, including the valuable privilege of free storage for eight months and the further privilege of mixing, packing and repacking while on the docks at Chicago. An examination of our files also discloses a tariff published by the Michigan, Indiana & Illinois Line itself, but not in force at the present time, that named a rate of $1.20 per ton on bulk salt from Buffalo to the Union Stock Yards, with the same storage and other privileges at Chicago.

"From this review of the facts we find the competitive character of the 10-cent rate to Chicago clearly demonstrated; and we find that the competitive conditions that fix that rate grow out of the relations between the Retsof Mining Company, the International Salt Company of Illinois, the Morton Salt Company and the Michigan, Indiana & Illinois Line, and their ownership and control of the facilities of transportation from Buffalo to Chicago, including as an important element the docks and warehouses at the latter point. Moreover, the record convincingly shows that if these salt interests should discontinue the operation of their boat line from Buffalo, and if the dock facilities at Chicago became available under reasonable conditions to all shippers, the tramp steamers would still present a vigorous competition that would compel the maintenance of a reduced rate by rail to Chicago. This is clearly shown by the force of the water movement to Milwaukee and other lake ports where tramp steamers are now able to land their cargoes of bulk salt and actually carry a substantial tonnage. That such competitive conditions do not exist at intermediate points seems to be shown by the fact that under their present adjustment of rates the rail carriers apparently retain the whole movement to such points.

"We attach no importance to the fact that Hammond and Hegewisch, which are not on the lake, are given the benefit of the Chicago rate of 10 cents. They are substantially Chicago-rate points, and can be reached by a comparatively short switching movement from the docks at South Chicago. There is no longer a considerable traffic to those points. Furthermore, it appears that the Chicago rate was originally extended to those destinations at a time when tramp steamers were taking salt from Buffalo at as low a charge as 25 cents per ton.

"The real issue, therefore, is whether the circumstances justify the continuance of the present relative adjustment of rates as between Chicago and intermediate stations. We think the answer to this question is plainly written on the record. The circumstances heretofore described clearly justify an exception in this case to the long-and-short-haul principle. There may be particular destinations in this territory to which the rates on salt ought to be reduced; and it may be that upon a more complete record some of the rates might appear to be unreasonable. There are also certain destinations beyond Chicago where the present through rates on coarse salt in bulk are said to exceed the combination of the 10-cent rate to Chicago plus the local rate beyond. In any such case a readjustment ought, of course, to be made. But it is not necessary at this time to enter any order in that regard. Looking at the case as a whole and upon the facts disclosed of record we are convinced that the complaint is without merit."

See also—

In re Wharfage Charges at Galveston, Texas, 23 I. C. C. Rep. 535.

§ 13. Allowances for Transfers.

It is held that reasonable compensation may be allowed for the transfer of a car. In the investigation conducted

by the Interstate Commerce Commission in the Matter of Allowances for Transfer of Sugar, it conclusively appeared that allowances for the transfer of sugar in their origin were incidental to a general plan for discriminating rates and rebates. These allowances first began in New York City and vicinity about 1885, and were then paid to equalize a rebate being allowed at Philadelphia. At that time these allowances were out-and-out rebates and were so-called. After their statutory prohibition these allowances were termed either transfer or cartage allowances.

These allowances were contemporaneous with many arrangements for rebates upon shipments of sugar. In some instances a lump rebate of a larger sum than that actually allowed for transfer was arranged between rail carriers and the establishment making the largest shipments of sugar from New York, and in consideration of such rebate it was agreed that no transfer allowance would be claimed. Again, when certain western lines refused to pro-rate in the customary transfer allowances, this was reduced to the amount of the portion so withheld. These allowances were secret, not being published until after the enactment of the Elkins Act, in 1903.

In 1898 a new arrangement involving this transfer allowance was made between the railways having membership in the Trunk Line Association and the sugar refinery interests, in which the aggregate tonnage of sugar refined in New York and Philadelphia and consigned to or beyond trunk line western termini was divided into pooling proportion among the several roads. The payment to the refineries of a uniform allowance of 2 cents for transfer was the consideration contemplated for the maintenance of the pool percentages by the American Sugar Refining Company. Prior to 1898 the allowance was a rebate to equalize certain Philadelphia rebates; in 1898 it was com-

pensation for the maintenance of an unlawful pool. In 1908, prior to the Commission's investigation and ruling, it was the same allowance, but justified under new reasons—namely, the actual transferring of the sugar.

In 1903, upon the passage of the Elkins Act with its penalties for violations of the Act to Regulate Commerce, the railroads in the pooling agreement very generally ceased to pay the transfer allowance, holding the same to be unlawful. Thereupon the American Sugar Refining Company ceased to protest the pool percentages in its shipments of sugar, holding that the pool and the transfer allowances were related as service and consideration. After about sixty days the allowance was resumed by the railroads and made retroactive for the shipments forwarded during the time of its discontinuance. Thereupon the American Sugar Refining Company again proceeded to protect the pool percentages. The pooling agreement covered all shipments from New York and Philadelphia, whether made by the American Sugar Refining Company interests or by the independent refineries. A daily report of all shipments of sugar was made by the Trunk Line Association to the shipping agent of the American Sugar Refining Company. As that concern was the largest shipper at both cities, it was able and by the agreement was bound to so route its shipments as to correct any departure from the agreed percentages caused by the independent routing of its competitors. The pool agreement in effect ended after 1904.

This transfer allowance was first published and filed with the Commission in 1903, after the passage of the amended act or so-called Elkins Act. From that time until the fall of 1906, after the passage of the amended Act to Regulate Commerce, it was referred to by tariffs of the various carriers. In 1906, however, the Pennsylvania

Railroad Company, the Baltimore & Ohio Railroad Company, the New York, Ontario & Western Railroad Company, and the Philadelphia & Reading Railway Company, and the Central Railroad of New Jersey, generally withdrew the allowance, being advised by their counsel that it was illegal. The New York, Ontario & Western, upon discontinuing the allowance, reduced its tariff rate by an equal amount.

In its analysis of these purported-transfer-allowances, the Commission said:

"It is insisted, however, that as the allowance is now published and filed, and as no proof is produced to show that a pool is now being maintained, the allowance must be regarded as entirely legal. The question thus presented can best be answered after an analysis of the varying provisions for this allowance now contained in the published tariffs of carriers subject to the Act. It will be necessary to consider only the initial carriers in this regard, it being noted that hundreds of connecting carriers join in each of these tariffs, concurring in their provisions and bearing shares of the allowance proportionate to their shares of the through rates. These tariffs may be summarized as follows:

"1. Those which offer an allowance for the transfer of sugar from refineries. The tariffs of the Erie Railroad Company (I. C. C. 5764 and 6707) are typical of this class. Their language is:

" 'Rates named herein on sugar will include transfer charge of 2 cents per 100 pounds from refineries to cars at New York and Brooklyn stations, Jersey City, N. J., and Edgewater, N. J.'

"Other tariffs in this class make the rates from Brooklyn, N. Y.; Jersey City, N. J., and Yonkers, N. Y., applicable from sugar refineries in these cities, 'subject to

an allowance of 2 cents per 100 pounds for transfer from refineries to cars.' These tariffs are intended to and do accomplish the same result as the tariffs of the Erie Railroad above quoted. The carriers having tariffs identical in effect with the above are the Lehigh Valley Railroad Company, National Dispatch-Great Eastern Line, the Canada Atlantic Transit Company and the Rutland Railroad Company.

"2. Those which offer transfer allowance without restricting such allowance to shipments from refineries. The Delaware, Lackawanna & Western Railroad Company, the New York Central & Hudson River Railroad Company and the West Shore Railroad Company are in this class. Prior to March 2, 1908, the Delaware, Lackawanna & Western Railroad restricted the allowance to shipments from refineries. On that date, however, this rule was changed to read as follows (I. C. C. 4773):

" 'Allowance—Transfer of Sugar—Allowance for Transfer on Sugar in Carloads—On shipments of sugar in carloads delivered at New York, Brooklyn, N. Y., Jersey City or Hoboken stations, an allowance of two (2) cents per one hundred (100) pounds will be made for transfer, to be deducted from through rate when destined to western termini of the trunk lines or points west thereof.'

"On September 15, 1908, the Delaware, Lackawanna & Western Railroad Company again amended the above rule by an addition which makes the payments applicable also on shipments of sugar in carloads 'from all points within the lighterage limits, except on traffic destined to or via the Baltimore & Ohio Railroad Company.'

"Effective October 1, 1908, the New York Central & Hudson River Railroad Company, and the West Shore Railroad Company on all-rail shipments to points west of Trunk Line territory published tariffs making an allow-

ance of 2 cents per 100 pounds on sugar in carloads for delivery to cars or stations of these railroads at New York, Brooklyn and Yonkers, N. Y., and Jersey City (Warren street), N. J. (N. Y. C. & H. R., I. C. C. B-6043 and B-6354; West Shore, I. C. C. B-2353, B-2567). On November 1 these all-rail tariffs of the New York Central and Hudson River and the West Shore Railroad companies were still further amended to make the allowance 'for delivery to cars' applicable on all shipments from Yonkers and from within the lighterage limits of Greater New York. Also effective October 27, 1908, the two railroads last above mentioned amended their lake-and-rail tariffs to points west of the Mississippi River, making the allowance in the form last above described.

"3. Those which offer an allowance upon all shipments of all commodities from certain designated districts but make no allowance on the same commodities when from other districts. The Clyde Steamship Line, the Mallory Steamship Company, the Morgan Line and the Old Dominion Steamship Company are all within this class. These steamship lines, doing business out of the port of New York in connection with rail lines reaching southern Atlantic ports and competing with the trunk lines for tonnage to points beyond Trunk Line territory, have an elaborate scheme of allowances for delivery of freight to their wharves in New York City. These allowances, so far as they are by the tariffs made applicable on shipments of sugar from refineries in or near New York, include 2 cents per 100 pounds for transfer in addition to a lighterage allowance. The entire allowance is generally published in a lump sum, only the Old Dominion Steamship Company distinguishing that portion which is paid for transfer. It is the testimony, however, that the allowances made by the steamship lines include an allowance of 2

cents for transfer of carload shipments of sugar and that therefore the result reached by the tariffs of the steamship lines is the same, so far as the transfer allowance is concerned, as the result reached by the tariffs considered in paragraph 1 above. That is to say, the steamship lines making lump-sum allowances, estimated lighterage and cartage separately, and in the lump sum given is included a 2-cent allowance for transfer, intended, in the competition for business, to meet and balance the transfer allowance given by the rail carriers.

"It appears from the testimony, and is admitted in the brief filed on behalf of certain of the carriers, that of the 1,330,000,000 pounds of sugar shipped in 1907 from the refineries at Brooklyn, Jersey City and Yonkers, upon which the allowance for cartage here considered was paid, only 70 per cent can possibly be said to have been carted. That is to say, of the total amount paid for cartage of sugar at New York City in 1907 ($266,000), the sum of $79,800 was paid upon shipments which were not carted, but were received by the carriers at the shipper's door.

"On this point counsel for the carriers say, with much frankness:

" 'In the case of some of the refineries the transfer service does not involve cartage. It consists of hand trucking and loading from the platforms of the refineries into the cars. While there is some service performed here for which these refineries are entitled to compensation, it is of course not so extensive as that performed by the refineries that cart their product, and the allowance of 2 cents per 100 pounds doubtless somewhat exceeds the cost of such service. However, if an allowance is made to the refineries that cart their product, the other refineries are entitled to some allowance also.'

"Counsel for those carriers joining in the brief on file

challenged the jurisdiction of the Commission to deal with the situation presented by their tariffs except by criminal prosecution, saying:

"'We, of course, do not question the propriety or the jurisdiction of the Commission to investigate on its own motion, without formal complaint by anyone, the legality of the payment of the allowance in question, to formally determine such question, and in the event that it finds the payment of such allowance to be illegal, to transmit its opinion to the proper United States district attorney, with request to institute prosecutions against the carriers to enforce the law. This practice has been, as we are of course aware, repeatedly adopted by the Commission in the past. We do, however, question the right of the Commission in an investigation of this nature, without the filing of a complaint, without any formal answer by the carriers, without a full hearing, to make an order requiring the carriers to cease and desist from such payment. Nor are we aware of any case where the Commission has made an order of such nature.'

"The jurisdictional question raised should be first considered. The admissions of counsel's brief help to shorten this opinion in that regard. The brief states that the allowance is prompted by 'traffic reasons,' and that 'the traffic reasons for the allowance are well known to the Commission from the statements of the traffic executives and from testimony at the hearings.' It appears from this admission and from the facts hereinbefore recited that full hearing has been given, and that the case on behalf of the carriers has been fully presented. The point urged, therefore is that the Commission lacks jurisdiction to forbid the further payment of the allowance because this proceeding was initiated by the Commission instead of by a person making a formal complaint to the Commis-

sion. A reference to section 13 of the Act to Regulate Commerce furnishes the answer to this connection. That section provides that the Commission 'may institute any inquiry upon its own motion in the same manner and to the same effect as though complaint had been made.' It therefore appears that the authorship of this proceeding furnishes no ground for attack upon the Commission's jurisdiction. Moreover, as will hereafter appear, our view of the nature of this payment necessitates the conclusion that it is forbidden by the Act itself, which Act is binding upon the carriers here, even though no order be issued by the Commission.

"All the tariffs purport to make the allowance as compensation for transfer. It necessarily follows that if the allowance is to be sustained the transfer of goods to the possession of the carrier must be held to be the carrier's duty, for which the shipper making the transfer is entitled to compensation. Such is not the law, and the first to resist an attempt to impose such duty upon the carriers would be the carriers themselves. Within the present year this Commission has decided at least two cases in favor of carriers involved in this proceeding and has held that the delivery of goods to a carrier and the receipt of goods from a carrier are duties devolving upon the shipper, for which the carrier can not be compelled to pay. For carriers to undertake to make to shippers allowances based upon the performance by the shippers for themselves of services which they are legally bound to do for themselves. is for the carriers to violate the Act to Regulate Commerce. Wight vs. United States, 167 U. S. 512; Chicago & Alton Ry. Co. vs. United States (C. C. A.), 156 Fed. Rep. 558; General Electric Co. vs. N. Y. C. & H. R. R. Co., 14 I. C. C. Rep. 237; Solvay Process Co. vs. D. L. & W. R. R. Co., 14 I. C. C. Rep. 246.

"Within the present year all of the carriers in this proceeding, except the boat lines, have acted under tariffs which restricted the allowance to shipments from refineries only, and the boat lines have acted under tariffs which restricted payments to shippers coming from certain designated territory to their wharves. Of course, we note the argument that there are no carload shippers of sugar in New York or vicinity except the refineries. We can understand how this must be so when such allowances as these are made upon shipments from refineries only. If rates were made absolutely equal to all shippers, whether refineries or others, there might be other shippers than refineries.

"Moreover, an allowance that is really paid for transfer should be equal to the transfer expense in each case. Here the carriers, on the basis of an assumption of transfer, pay some, if not all, the shippers more than their transfer expense.

"No one of the carriers in this proceeding furnishes cartage to shippers of sugar. All of them undertake to pay shippers for furnishing such cartage for themselves. Having thus undertaken to regard a service outside of transportation as a service to the transportation company, to be paid for out of the transportation rate, the carriers also furnish store-door reception to one-third of the shipments by means of floats and switch tracks, thus making cartage of such shipments not only superfluous but impossible. Still, the payment of $79,800 is made to these shippers for performing for themselves a service which the carriers have made unnecessary and which is not performed.

"It is urged by all of the carriers filing briefs, that the tariff filed by the Delaware, Lackawanna & Western Railroad should be taken by the Commission as the publication

of a gross and net rate. Thus on page 2 of their brief it is said, referring to Rule 51 in D., L. & W., I. C. C. 4774, hereinbefore quoted:

" 'Under the above forms of tariff, therefore, the Lackawanna Company quotes its gross carload rates on sugar to western points, less an allowance of 2 cents per 100 pounds to all carload shippers delivering sugar at any of its New York stations, or tendering sugar for shipment anywhere within the lighterage limits of New York harbor. As the allowance is therefore made to all shippers alike, under all circumstances, and the shipper always pays the freight, the effect thereof is a gross and net rate to all shippers. The legal rate under the tariffs for the transportation of carload west-bound sugar is therefore 2 cents under the rates named in the commodity tariff cited, to the western termini of the Lackawanna Company and points beyond.'

"This is an attempt to raise a question which is not presented by the facts. As published, all the tariffs making the allowance expressly state that it is made for 'transfer.' Moreover, up to March 2, 1908, the 'net rate' was granted to shipments 'from refineries' only. On that date the Delaware, Lackawanna & Western published its rule, by which the 'allowance for transfer of sugar' was made applicable to all shipments delivered at New York, Brooklyn, Jersey City or Hoboken stations. This tariff has since been amended by making the allowance payable on all shipments from within lighterage limits whether delivered at the terminals by the shippers or not, as well as upon shipments from all points whatsoever when delivered at the terminals. The New York Central and West Shore lines have filed tariffs, applicable to shipments to points east of the Mississippi River, effective October 1, 1908, which offer the allowance to all shipments delivered at

its stations in Greater New York and Yonkers, and on November 1, 1908, these tariffs were further amended to offer the allowance on shipments from 'all points in the lighterage limits,' as does the present Lackawanna rule. The New York Central & Hudson River Railroad Company and the West Shore Railroad Company confined the allowance on rail-and-lake shipments to points west of the Mississippi to shipments from refineries until October 27, 1908. The method pursued by the water carriers has already been described.

"All the other tariffs making the allowance restrict it to shipments 'from refineries.'

"If counsel are right in saying that this is simply a gross and net rate, then all the rail carriers, within the present year, have violated the Act by restricting their net rates on sugar to shippers from refineries, quoting to all other possible shippers a rate 2 cents per 100 pounds higher than this net rate; while the water carriers have restricted the allowance to shippers from certain districts only.

"Even if the question of allowing gross and net rates were presented, it is apparent that such method of publication would be rarely allowable. If carriers can publish rates in one tariff and discounts or allowances from such rates in another tariff, or even in another page of the same tariff, the present difficulties of shippers and rate clerks will be multiplied.

"Wherever it is possible, as it is here, for carriers to file a net rate as such, we are clear that this is their duty.

"The transfer allowance here considered is, by every test afforded by the law, a rebate. It seems to be given with a purpose of reducing the rates for transportation of sugar from New York, being called a 'transfer allowance' to conceal the fact that such reduction is made. It is not a payment for any actual service rendered to the carriers,

and from every point of view, whether given on shipments from refineries only, or to the public generally, and whether specifically named in the tariffs or included in but concealed in a lighterage or cartage allowance, it is unlawful in and of itself."

> In re Matter of Allowances for the Transfer of Sugar, 14 I. C. C. R. 619, 627, 630.

The Baltimore & Ohio Railroad Company, and other carriers, have prescribed limits in and about New York harbor within which they will, for the flat New York rate, perform the service of transporting traffic between their rail terminals on the Jersey side of the Hudson and points in the harbor. At Yonkers, N. Y., some distance north of the free-lighterage limits, the Federal Sugar Refining Company of Yonkers operates a sugar refinery, and to make shipments therefrom over the carriers' lines it must lighter the sugar from its refinery to points within the lighterage limits or forward it via the New York Central to Sixtieth Street, New York. By the latter route it can obtain the New York rate, but the route was unsatisfactory by reason of alleged delays in the New York Central's city terminal. One of the carriers' leased terminals in Brooklyn was owned and operated by the same partnership which operated a sugar refinery in competition with the Federal Refinery, the sugar from this (first) refinery passing through the terminal and the partnership receiving from carriers for lighterage thereof the same amount allowed for lighterage of other freight by the same terminal company. In a case brought in June, 1908, before the Interstate Commerce Commission, by the Federal Company against the Baltimore & Ohio Railroad Company, and other carriers, it was charged by the Federal Company that upon shipments delivered by it to the carriers' Jersey

rail terminals, it should have received the same allowance that was made to companies lightering freight from points in New York harbor, or that the lighterage limits should have been extended to include Yonkers.

The geographical and physical conditions of the port of New York are such that lighterage or transfer of cars by floats is indispensable. All roads are obliged to do it, more or less, and it is done for all kinds of traffic and for shippers generally. It is simply a necessity of the situation, and doubtless an inconvenience and expense that all would be glad to avoid if possible.

As to the Federal Company's contention, the Commission held:

That by their lighterage regulations the carriers had, in the only available manner, extended their lines to New York, but such extension resulted from the exercise of business discretion, not from compliance with any requirement of the Act to Regulate Commerce; and by such extension carriers incurred no liability, under the Act, to extend their lines to Yonkers or other nearby communities.

The identity of ownership between the Jay Street terminal in Brooklyn and the adjoining refinery in Brooklyn was a relationship which should be subjected to the closest scrutiny. The only inference which could be drawn from the record before the Commission was that the Jay Street terminal did not earn in excess of a reasonable return upon the investment.

The principle involved was stated In the Matter of Allowances, 12 I. C. C. Rep. 85, as follows:

"'It is true that under the terms of section 15 of the amended Act to Regulate Commerce a shipper may receive, in the rates charged, a "just and reasonable" allowance from a carrier for any service or instrumentality furnished by him in connection with the transportation

of his own property. This provision, however, must be read in connection with the other provisions of the law forbidding and making unlawful any arrangement or practice that results in an undue preference or an unjust discrimination in favor of one shipper as against others, or that results in a rebate or other departure from the lawfully published rates. And therefore if the allowance involves a profit over and above the actual cost of the service rendered it becomes, when made to a shipper, a rebate and an unlawful discrimination to the extent of the profit realized. It is not a rebate when it does not exceed the actual cost. But to avoid that fundamental objection the actual cost of the service rendered must be the limit of the allowance.'

"Upon the present record it is not shown that any profit accrues to the Jay Street terminal under the payments now made, as stated above, of 3 and 4 1/5 cents per 100 pounds. Indeed, the only inference which can be drawn from the proof submitted is that the Jay Street terminal does not receive a reasonable return upon the investment. If this be the truth of the matter, as must be assumed on the evidence now before us, we are unable to perceive that the existing relationship between the defendants and this terminal company is illegal or results in any violation of the Act. The fifteenth section as amended clearly implies that a just and reasonable allowance may be made to the owner of property transported, when such owner renders a service connected with or furnishes an instrumentality used in the transportation. This provision, for aught we can see, applies to the Arbuckle concern, and nothing has been made to appear which indicates that the allowance to that concern exceeds the authorized measure of compensation."

Federal Sugar Refining Company of Yonkers vs. B. & O. R. R. Co. et al., 17 I. C. C. R. 40, 47.

The Commission was divided in its opinion in the original Federal refinery case, three members dissenting. The case was reconsidered by the Commission on April 13, 1910, as the Federal Sugar Refining Company vs. Baltimore & Ohio R. R. Co. et al., 20 I. C. C. R. 200, and a more elaborate state of facts put before the Commission. So important is this decision in its bearing upon the question of allowances that it is essential to quote copiously from this subsequent report. The full statement of facts before the Commission may be succinctly set forth as follows:

There are three sugar refineries in New York and vicinity, namely, the Federal Sugar Refining Company, the complainant, whose factory is located at Yonkers, N. Y., and the Arbuckle Brothers, and the American Sugar Refining Company, the factories of the two latter being located in Brooklyn, N. Y. The complainant, the Federal refinery, contended that the defendant carriers by their rates discriminated against it in favor of its two competitors.

Yonkers, where the factory of the complainant is located, is without the free lighterage limits of New York, while the plants of Arbuckle Brothers and the American Sugar Refining Company are both situated within those limits. The original complaint alleged that Yonkers should also be included within these lighterage limits, and the discrimination alleged in that complaint was the failure of the defendants to so extend their lighterage service.

Upon a full presentation of the matter the Commission held that the New York lighterage limits ought not to be extended to include Yonkers, and that the defendants were within their lawful rights in declining to embrace the factory of the complainant within those limits. This situation should be kept in mind.

From all points within the lighterage limits the New York rate of the defendants applies, but that rate does not apply from points without those limits unless the point is located upon the line of some one of the defendants. Under this rule, the propriety of which is unquestioned, the American Sugar Refining Company and Arbuckle Brothers are entitled to have their sugar lightered free at the New York rate to the rail termini of the defendants in Jersey City and Hoboken.

The plant of the complainant at Yonkers is upon the tracks of the New York Central System, and its product for all points reached through that system and its connections can be loaded from the storehouse into the car, but there are many points which can not be satisfactorily reached by this route, and for which the complainant finds it necessary to use the lines of the defendants; and in that event the sugar of the complainants must be transported by lighter from the plant at Yonkers to their rail termini at Jersey City, in the same way that the sugar of its competitors must be lightered from their plants to Jersey City, but inasmuch as its plant is without the free lighterage limits the complainant is put to the expense of that lighter service.

Arbuckle Brothers and the American Sugar Refining Company have therefore a transportation advantage over the complainant with respect to their sugar shipped by the defendant lines through Jersey City, which arises out of the location of their plants and which the Commission has held and still holds is legitimate. The Federal Sugar Refining Company has, doubtless, from its location at Yonkers, certain advantages over its rivals. Its factory may have cost it less; its rents may be less; it may find labor conditions more favorable. It has immediate access to the rails of one of the great railroad systems of this

continent and for all points upon that system or its connections its product can be transferred from the warehouse to the car. But to offset these advantages it labors under the transportation disadvantage of being compelled to lighter its own product to Jersey City, while the product of its rivals is carried free.

In disposing of the latter case, the Commission said:

"We had not regarded section 15 of the Act as a warrant to a carrier for making an allowance to one shipper providing a facility and performing a service in the transportation of his own property, while refusing a similar allowance to another shipper providing a similar facility and performing the same service in the transportation of his property. Nor had we understood that a carrier, while giving to one shipper the privilege of providing a facility and performing a service in the transportation of his property, could refuse the same privilege to another shipper, and compensate the former while refusing any allowance to the latter. Nor is that the law. Certainly it can not be the law when the two shippers are competitors in the same line of business and in the same markets. If the defendants accord Arbuckle Brothers the privilege of lightering their sugar from their dock and make them an allowance therefor, we regard it as axiomatic, under the principles of this legislation, that they must accord a like privilege and make a like allowance to the complainant from Pier 24, the complainant being a competitor in the same line of business and reaching the same markets of consumption. Indeed, we see little ground, upon the facts now before us, for denying the privilege and the allowances to the complainant from the point where its sugar crosses the lighterage limits established by the defendants. That, however, is a question that need not be discussed, for we

have found that the complainant now lighters its sugar from Pier 24, which is within the lighterage limits.

"The defendants, however, insist that the provisions of section 15 need not necessarily have so broad a construction. Their view is that the privilege of furnishing the facilities and performing a part of the transportation service may be accorded, and the payment therefor made, to one shipper without laying the carrier under the obligation of according the same privilege and making a similar payment to another and competing shipper who provides a similar facility and performs a similar service in the transportation of his property. 'If the Jay Street terminal,' they declare, 'is to be operated as a public station, the handling of the Arbuckle shipments through the terminal and by the equipment of the terminal (i. e., by the Arbuckles), as all other shipments are handled, must be viewed as a natural incident to that operation.' Inasmuch as the Jay Street terminal has been established 'it should be open,' they say, 'to all shippers without discrimination. * * * To require the Arbuckles to deliver their shipments at some point distant from the terminal, there to be picked up and transported to the Jersey terminal by railroad equipment, would be a strained and unnatural proceeding, and a discrimination against the Arbuckles.' It would be equally strained, as we are told, to require the defendants, after having made the Arbuckles their agents in operating the Jay Street terminal, to set aside that arrangement with respect to the Arbuckle sugar and handle it with railroad employees and with railroad equipment. This, they say, would be both inconvenient and expensive. From that point the argument of the defendants proceeds easily and rapidly to the proposition that, when a carrier, by an agreement with a great shipper, turns his dock into a railroad terminal and has it operated for it by the shipper,

the circumstances and conditions surrounding that shipper and his particular traffic differ from the circumstances and conditions surrounding another shipper, although competing in the same line of business, 'who does not furnish public terminal facilities for the carrier;' and that such a situation justifies the carrier 'in permitting the shipper who operates a public terminal for it to perform such terminal service on his own shipments while refusing to permit a shipper who does not operate a public terminal to perform a similar part of the transportation service.' In other words, as we gather the point of view of the defendants, the very arrangement that makes a railroad terminal of the dock owned by, and adjoining the refinery of, these shippers, and saves them the cost of teaming or otherwise conveying their immense traffic to a public terminal operated by the carriers themselves, also erects around those shippers a bulwark of dissimilar circumstances and conditions that justifies the carrier in giving them the further privilege of providing their own facilities for lightering their shipments across the river, thus performing also a part of the transportation service, and being compensated therefor by ample allowances; while the privilege is withheld from another shipper who is their competitor in the same line of business.

"That contention can not be admitted as sound. On the contrary, we hold that when a carrier undertakes to have such a terminal operated for it by the owner of the property and the owner happens also to be a large shipper over its line, the law reads into the agreement between the carrier and the owner the peremptory requirement that the arrangement shall not result in any undue and unjust discrimination against other shippers competing with the owner in the same line of business. The prohibition of inequalities among shippers is perhaps more fundamental

and vital than any other feature of the Act. And when a carrier undertakes to supply its needs by private contract with a shipper—whatever may be its purpose, and however plainly it may be grounded in good faith, or however clearly it may spring from the practical necessities of the carrier—by giving him certain opportunities and advantage in the handling of his traffic over its lines, those opportunities and advantages may not lawfully be withheld from his competitors. However straightforward the relation between a carrier and a shipper may be, it is essentially wrong, and violates the provisions of the statute against preferences and discriminations, when the carrier endeavors under such a private contract to turn the shipper into its agent, and thus, whether purposely or incidentally, gives him privileges and advantages in connection with the transportation of his property that are withheld from his competitors. If such a transaction is conceived in bad faith and works unlawful results, it is manifestly unlawful. But good faith will not save it from like condemnation if it involves preferences and discriminations that are undue and unjust. It is not the intention of the parties but the actual results that flow from the arrangement that constitute the test. And we find that the terms under which the defendant carriers accept the sugar of Arbuckle Brothers at their regular stations west of the river, do result in inequalities, preferences and discriminations, and are unduly and unjustly prejudicial to the rights of the complainant as a shipper of sugar over the lines of the defendants in competition with Arbuckle Brothers in the same markets.

"We are told that the contention that a discrimination is being practiced against the complainant 'could be forcibly urged * * * if the refinery of the complainant had been located within the lighterage limits,' and that the

'trouble of the complainant springs from its location without the free lighterage limits.' So far as the record gives us any light on the matter the complainant is not seeking to ship its refinery over the lines of these defendants; the whereabouts of the refinery is therefore wholly non-essential and of no possible concern to anyone. It is the sugar that the complainant is offering for shipment, and it is offered from a point that is within the lighterage limits. It may have been manufactured in the Philippines, or brought in from Porto Rico, or imported from Germany. This particular sugar happens to have been refined at Yonkers. But wherever it may have been made, the relevant fact from a transportation point of view is that at a given moment a quantity of sugar is at Pier 24 ready for shipment to interstate destinations on the lines of these defendants. It matters not how it got there, whether by lighter or by cart or by wheelbarrow; it is ready for shipment at that point. At the same time a like quantity of sugar is ready at the Arbuckle dock for shipment over the same lines and to compete in the same markets. Under every principle of equality embodied in this legislation, the defendants must deal with the two shippers on exactly equal terms. They must themselves lighter the sugar to their regular freight stations across the river with their own equipment, or must accord to each shipper the privilege of doing the lightering in his own way; and if under section 15, or under any other provision of the Act, they pay an allowance to one of the two shippers, on the theory that he has furnished a facility and performed a part of the transportation service for the defendants, they must make a like allowance to the other shipper who has done precisely the same thing. To say that the defendants have made an agent of one shipper to do the lightering for it and have not established that

relation with the other serves but to emphasize the discrimination, and seems neither to reach the equity and common justice of the situation, nor to constitute even a superficial compliance with the equality of privilege, service and rate that the law requires of carriers in their contact with interstate shippers."

The crux of this decision is that Arbuckle Brothers operate their dock in Brooklyn as a terminal for the defendant carriers and that that fact does not justify an allowance to them for lightering their sugar to the regular stations of the defendant carriers on the Jersey shore, so long as an allowance to the complainant for lightering its sugar to the same stations from Pier 24 (within the lighterage limits) is refused. Likewise that a receiving station operated for carriers by a competitor in the same line of business, is not a reasonable facility of transportation to offer a shipper.

See also—

Refuge Cotton Oil Co. vs. St. L. I. M. & S. Ry. Co., 27 I. C. C. Rep. 117, 120.

See also—

Merchants and Mfrs. Assn. vs. B. & O. R. R. Co., 388, 389.
Kamm & Co. vs. P. Co., 25 I. C. C. Rep. 198, 199.

CHAPTER XI.

ALLOWANCES PERMITTED BY LAW—(Continued).

§ 1. Allowances for Elevation.
§ 2. Allowances Limited by Cost of Service.
(1) Allowance for Car Fitting Condemned.
§ 3. Allowances to Tap Lines and Industrial Railways.

CHAPTER XI.

ALLOWANCES PERMITTED BY LAW—(Continued).

§ 1. Allowances for Elevation.

There are two kinds of elevation, one of which may be termed transportation elevation, consisting of the passing of the grain through an elevator for the purpose of transferring it from car to car and obtaining its weight, and commercial elevation, which involves various processes in the treatment of the grain itself, like cleaning, mixing, clipping, drying, etc. The first sort of elevation is an incident to the transportation of the grain, the second to the merchandising of the grain. The decision of the Supreme Court of the United States upholds the ruling of the Commission that the Act to Regulate Commerce requires carriers to furnish transportation elevation; that this may be done by employing the owner of the grain to perform the service and that the fact that this grain, in the process of transportation elevation, can be and is made the subject of commercial elevation also, while an advantage to the owner of the grain, is not an undue discrimination within the meaning of the Act.

Transportation elevation has been defined by the Commission as passing the grain through the elevator with 10 days' free storage. For the purpose of confining the payment of the elevation allowance to transportation elevation proper, the Commission directed in the Peavey

case (12 I. C. C. R. 85, 14 I. C. C. R. 315, 176 Fed. Rep. 409) that no allowance should be made unless the grain went through the elevator within the 10-day period. The purpose of the Commission in so holding was to prevent the payment of allowances for commercial elevation.

In June, 1908, the Commission entered two orders with respect to the payment of elevation allowances upon the Missouri River—one in the Peavey case, supra, and the other in the St. Louis cases (14 I. C. C. R. 317). The order in the St. Louis cases directed the Burlington road to cease and desist from the payment of all elevation allowances upon the Missouri River; in the Peavey case the Union Pacific Railroad Company was directed to desist from the payment of an elevation allowance to Peavy & Company upon their own grain, which had been commercially treated in passing through their elevator, and to confine the payment of the elevation allowance in all cases to grain passing through the elevator in 10 days.

Certain railroads leading from the Missouri River and certain grain interests located at Missouri River points, contested the validity of these orders and the matter finally reached the Supreme Court of the United States, which, in the winter of 1911, handed down a decision holding that the order of the Commission in the Peavey case was unlawful so far as it prohibited the payment of an elevation allowance as to the grain of Peavey & Co., which had been commercially treated, but was lawful in so far as it required that the payment of such allowance be confined to grain passing through the elevator in 10 days. The order in the St. Louis cases was declared unlawful also.

I. C. C. vs. Diffenbaugh, 222 U. S. 42.

See also—

U. P. R. R. Co. vs. Updike Grain Co., 222 U. S. 215.

Upon the rendition of this decision by the Supreme Court, the Commission withdrew its order in the St. Louis cases, set those proceedings down for further hearing and on February 5, 1912, promulgated its order to the effect that the carriers should not exceed three-fourths of 1 cent per 100 pounds in the payment of elevation or transfer allowance at the Missouri River, and to confine that payment to grain actually passing through the elevators in 10 days.

Traffic Bu., etc., vs. C B. & Q. R. R. Co. et al., 22 I. C. C. R. 496, 506.

In the Matter of Elevation Allowances at Points Located upon the Missouri, Mississippi and Ohio Rivers, and on the Great Lakes, 24 I. C. C. R. 197, decided June 6, 1912, the Commission announced its modified ruling:

"All grain dealers upon the Missouri River insist that the present allowance does not more than cover the cost of the service, but a considerable portion of the elevators in that locality are in favor of settling this controversy upon the basis of one-fourth of 1 cent per bushel. A majority, however, insists that the present allowance shall be adhered to.

"Upon this showing Chicago and allied interests asked the Commission to prohibit the payment of any allowance at the Missouri River and elsewhere in excess of ¼ cent per bushel, and stated that they were prepared to show that this amount was sufficient to cover the cost of transfer. The Commission thereupon directed the taking of testimony at these various markets to show the cost of transfer, and such testimony has been taken at considerable length, briefs having been filed by the various parties.

"In dealing with this subject in the past the Commission has treated as elevation whatever was performed at the ordinary elevator. We prohibited the payment of the elevation allowance in the St. Louis cases upon the theory that this was not intended to cover a transfer of the grain nor any other transportation service, but rather the commercial service which the elevator performed in the merchandising of the grain.

"It is extremely difficult to separate transportation elevation from commercial elevation. Both things are parts of the same general process. The same plant facilities, the same power, the same gang, are employed, and the process of transfer and the commercial process go on at the same time. It has, therefore, been found impossible to separate the different items of expense and to say with confidence this belongs to transportation and this to commercial elevation.

"Very much must also depend upon the amount of business transacted and the conditions under which it is transacted. If an elevator runs to its transfer capacity it might be an altogether different thing than if it ran to its storage capacity with comparatively little transfer.

"Originally the transfer was made by the railroad itself directly from car to car. Various appliances were devised for performing this service, and grain was often transferred by private parties at so much per bushel. When it finally became evident that the transfer could be best made through the elevator and in connection with these various commercial operations, one-fourth of 1 cent per bushel was agreed upon in eastern territory as fairly representing the cost of the transfer, or that part of the elevation for which the railroad ought fairly to pay. The same amount has been adhered to upon the same theory ever since.

"Exercising our best judgment upon all the facts before

us, we are of the opinion and find that if this allowance should be confined solely to what we have defined as transportation elevation, then one-fourth of 1 cent per bushel is fair compensation for that service; that is, it covers the cost of the service and something beyond. If, however, the railroad is entitled to compensate the owner of the grain not only for transportation elevation but for commercial elevation as well, then, in our opinion, the three-fourths of 1 cent per 100 pounds can not be properly reduced.

"If, now, the Commission is of the opinion that these allowances should be confined to transportation elevation and that one-fourth of 1 cent per bushel is a fair compensation for that service, why should it not comply with the general desire and direct carriers to desist from paying more than that amount upon the Missouri River? The answer to this inquiry is found in the existence at these Missouri River markets of what is known as the railroad elevator.

"Nearly all railroads operating upon the Missouri River own elevators at one or more of these grain markets. These elevators are frequently leased to grain dealers, sometimes at an almost nominal rental and sometimes upon a fairly compensatory basis. In many instances, however, the elevators are operated by the railroad itself, either directly or, usually, through the intervention of a subsidiary company which does not engage in the grain business itself.

"At the present time these railroad elevators include as a part of their elevation service the cleaning, mixing and clipping of the grain; occasionally other operations may be included.

"If now we require the railroad to limit its allowance to one-fourth of 1 cent per bushel when paid to a private

elevator, while the railroad elevator is still permitted to extend to its patron not an elevation allowance but an elevation service, which includes both transportation and commercial elevation, plainly a discrimination arises in favor of the shipper who uses the railroad elevator and against the shipper who employs his own elevator for these commercial operations. In order, therefore, to do justice at the Missouri River, where these railroad elevators exist, we must not only prohibit the payment by the railroad to the private elevator of more than one-fourth cent per bushel, but we must also prohibit the railroad from rendering for the shipper at its own elevator, free, any services beyond transportation elevation proper. We must go further. We must determine what is a just charge for these commercial operations and insist that the railroad elevator, if it performs the operations, shall charge not less than the sums found reasonable.

"All this is fully recognized by the parties to this proceeding and considerable testimony has been introduced tending to show what would be a fair charge for these different commercial processes. The parties do not altogether agree and the testimony is not very satisfactory. Upon the whole we are of the opinion that the following figures are substantially just:

"For storing, ¼ cent per bushel for each 10 days or part thereof after the first 10 days.

"For clipping, ¼ cent per bushel.

"For cleaning, ¼ cent per bushel.

"For mixing or turning, ⅛ cent per bushel.

"For sulphuring, ⅛ cent per bushel.

"For drying, from 1 to 1½ cents per bushel.

"For sacking, ½ cent per bushel (sacks and strings to be furnished by the owner of the grain).

"While it may be that this Commission, for the purpose

of preventing discrimination, may have the jurisdiction to make the comprehensive order which would be required to establish the ¼ cent allowance and these varied charges, still an attempt to do this would probably lead to further litigation of which the outcome would be doubtful. The safer way would seem to be, if the necessity for making any order arises, to apply generally the 10 days' limitation which has been approved by the Supreme Court.

"The Commission believes that the payment of all elevation allowances and giving of all free elevation should be prohibited, for in no other way can discrimination be prevented. Every service of benefit to a shipper should be charged for at a reasonable sum and no advantage should be allowed one shipper over another. The Supreme Court of the United States has, however, decided that under the Act to Regulate Commerce some sort of an elevation allowance may be made and this decision we fully accept.

"The query now arises as to the manner in which this right to make an allowance can be exercised with the least discrimination. It seems evident that the same allowance should be made at all points which are fairly competitive with one another, and this means that the same allowance should be made, since the cost of performing the service is substantially the same, upon the Missouri River which is made upon the Mississippi River, upon the Ohio River, at Chicago, and at various other points in eastern territory through which this grain moves by rail upon its way to market. This condition would be realized if the allowance upon the Missouri River were reduced to one-fourth of 1 cent per bushel and if railroad elevators were to charge a fair compensation for commercial services performed. We strongly recommend that this matter be adjusted upon that basis, and we shall potspone the making of any order

in this matter until reasonable opportunity has been given for such an adjustment. Unless some such arrangement is at once established, the Commission will proceed to the making of an order probably applying generally the 10-day rule which the Supreme Court has approved.

"Upon this last point it should be said that considerable testimony was introduced in the course of this investigation showing that to confine these allowances to grain passing through the elevator in 10 days would be to largely prohibit the payment of such allowances altogether. We understood when the original order in the Peavey Case was made that its tendency would be to confine the payment of these allowances to transportation elevation and to prevent their application to commercial elevation. Nothing in the testimony which we have heard tends to convince us that transportation elevation can not be brought within the 10-day limit."

See also—

Farmers' Cooperative Assn. vs. C. B. & Q. R. R. Co., 34 I. C. C. Rep. 60, 65.
Milwaukee Malsters' Traffic Assn. vs. G. R. W. Ry. Co., 28 I. C. C. Rep. 489, 493.
Kamm & Co. vs. Pa. Co., 25 I. C. C. Rep. 198, 200, 201.
Ryley vs. Wabash R. R. Co., 25 I. C. C. Rep. 210.
In re Keystone Elevator Co., 25 I. C. C. Rep. 618.
Gund & Co. vs. C. B. & Q. R. R. Co., 25 I. C. C. Rep. 326, 329.
In re Elevation Allowances, 24 I. C. C. Rep. 197, 199, 203, 204.
Transit Case, 24 I. C. C. Rep. 340.
Luffern Grain Co. vs. I. C. R. R. Co., 22 I. C. C. Rep. 178, 182.
Traffic Bureau Merchants Exchange vs. C. B. & Q. R. R. Co., 22 I. C. C. Rep. 496, 563, 506.
Gund & Co. vs. C. B. & Q. R. R. Co., 18 I. C. C. Rep. 364, 366.
Duncan & Co. vs. N. C. & St. L. Ry. Co, 16 I. C. C. Rep. 590, 592.
Nebraska-Iowa Grain Co. vs. U. P. R. R. Co., 15 I. C. C. Rep. 90, 100, 101.

Washer Grain Co. vs. M. P. Ry. Co., 15 I. C. C. Rep. 147, 158.
In the Matter of Allowances to Elevators by the U. P. R. R. Co., 14 I. C. C. Rep. 315, 316.
Traffic Bureau Merchants' Exchange vs. C. B. & Q. R. R. Co., 14 I. C. C. Rep. 317, 328, 331.
Traffic Bureau of St. Louis vs. C. B. & Q. R. R. Co., 14 I. C. C. Rep. 551.
I. C. C. vs. Diffenbaugh, 22 U. S. 42, 45.
U. P. R. R. Co. vs. Updike Grain Co., 222 U. S. 215, 220.

§ 2. **Allowances Limited by Cost of Service.**

While it is true that under the terms of section 15 of the amended Act to Regulate Commerce a shipper may receive, in the rates charged, a "just and reasonable" allowance from a carrier for any service or instrumentality furnished by him in connection with the transportation of his own property, this provision must, however, be read in connection with the other provisions of the Act forbidding and making unlawful any arrangement or practice that results in an undue preference or an unjust discrimination in favor of one shipper as against others, or that results in a rebate or other departure from the lawfully published rates. And therefore if the allowance involves a profit over and above the actual cost of the service rendered it becomes, when made to a shipper, a rebate and an unlawful discrimination to the extent of the profit realized. The allowance is not a rebate when it does not exceed the actual cost, but to avoid that fundamental objection, the actual cost of the service rendered must be the limit of the allowance.

In the Matter of Allowance, etc., 12 I. C. C. R. 85.

(1) **Allowance for Car Fitting Condemned.** Not infrequently a prospective shipper is tendered a car by the carrier which, before it may be loaded with the shipper's

freight, must be repaired in some minor respects. For the shipment of grain the car may have holes in the floor, which must be covered up. Shippers frequently make these necessary repairs and seek reimbursement from the carrier, but the carrier, under the rules of the Interstate Commerce Commission, may not lawfully compensate the shipper for such repairs or car fittings, since such an arrangement would be susceptible of use as a subterfuge for granting rebates. In this class of cases, the Commission lays down the rule that it is the primary duty of the carrier to furnish the shipper with equipment that is safely usable, and if the car furnished is unfit, the shipper should reject it and demand another car from the carrier.

There are many objectionable features to a rule of this kind, but the Commission insists upon its compliance on the part of shippers because of the dangerous nature of allowances of this character, as subterfuges for rebating.

Balfour, Guthrie & Co. et al. vs. Oregon-Washington R. R. & Nav. Co., 21 I. C. C. Rep. 539, 540.

§ 3. Allowances to Tap Lines and Industrial Railways.

The close relationship between allowances and rebates is plainly apparent in the practice on the part of railroad companies of making allowances to terminal or industrial railroads or boat lines owned or controlled by shippers. The Elkins amendment made manifest the intent and purposes of the Act to Regulate Commerce "to strike through all pretense, all ingenious devices, to the substance of the transaction itself."

Re Division of Joint Rates, 10 I. C. C. R. 385, 661.

It condemned therewith excessive divisions of rates granted by a carrier to another carrier operating terminal

roads owned and controlled by a shipper, for the purpose of obtaining the traffic of that shipper, on the ground that they benefit the shipper and operate as rebates or other devices to deviate from the tariff charge in violation of the law.

Re Division of Joint Rates, 10 I. C. C. R. 385, 661.

In declaring the lawful ability of the Illinois Northern Railroad, a railroad owned by the International Harvester Company, but which maintained a freight station at which it received and delivered less than carload freight for the general public, and besides, served in a switching capacity numerous other industrial plants on its line of railroad besides its owner, to make joint rates, file joint tariffs, and agree upon joint divisions, the Commission held, as the premise for such decision, that the Illinois Northern Railroad was a common carrier.

We have seen that to enable a common carrier to make an allowance to a shipper for services rendered or facilities provided in the transportation of his property, such services and facilities must be essential to the transportation service of the carrier and which the shipper may in law properly demand from the carrier. But common carriers are under no duty to extend their transportation obligations with the extension of great industrial plants to accept and deliver cars within the enclosure of such plants over a network of interior switches and tracks constructed as plant facilities to meet the requirements of the industry. Thus, if the shipper establishes and operates for himself an industrial railroad owned by him and devoted exclusively to facilitating the operation of his plant, he has done nothing which he may call upon the carrier to do for or furnish him. For such facilities he may not ask compensation from the carrier.

A common carrier subject to the Act to Regulate Commerce may allow a division of rates only to another common carrier which, participating in the particular traffic to which the rate is applied, is also subject to the Act.

Cent. Yellow Pine Assn. vs. Vicksburg, etc., R. Co. et al., 10 I. C. C. R. 193.

Following the decision of the Supreme Court of the United States in the Tap Line cases, the Commission entered supplemental orders vacating former holdings denying the tap lines the right of allowance and participation in joint rates and requiring the re-establishment of through routes and joint rates as in effect prior to May 1, 1912. In its supplemental report the Commission announced the following modifications of its original conclusions:

"In our original and supplemental reports herein, we found that certain of the tap lines that were parties thereto did not perform a service of transportation for their respective proprietary companies, either in the movement of the lumber of the proprietary company from its mill to the trunk line, or in the movement of the logs from the forest to the mill; that this was a plant service with plant facilities; and that any allowances or divisions out of the rate on account thereof were unlawful and resulted in undue and unreasonable preferences and unjust discriminations. Other tap lines that were parties to the proceeding were recognized as performing a service of transportation with respect both to proprietary and non-proprietary traffic, and in those cases we authorized the re-establishing of through routes and joint rates, and fixed the divisions that might be paid by the connecting trunk lines to those tap lines out of the through rate. An order was issued in conformity with these findings. Later five

of the tap lines, to which, as we had held, divisions could not lawfully be paid by the trunk lines, filed petitions in the Commerce Court, seeking to have the order of the Commission enjoined and annulled. The decree of that court vacated and set aside that portion of the order of the Commission wherein it was held that with respect to the product of the proprietary mills the five tap lines did not perform a service of transportation. From this order an appeal was taken to the Supreme Court of the United States.

"In its opinion in the case above cited the Supreme Court held these five lines to be common carriers with respect both to proprietary and nonproprietary traffic, and that the Commission had exceeded its authority in condemning the divisions previously allowed to them out of the through rate, as an attempt to evade the law and to secure rebates and preferences.

"There were 57 tap lines to which, in its original and supplemental reports, the Commission refused to sanction allowances on the general grounds above stated; but although the appeal was taken to the courts on behalf of only five of these tap lines, nevertheless the rulings announced by the court extend in principle to all of them, and we have felt in duty bound to apply the rulings to the entire group.

"In its opinion the Supreme Court, among other things, said, id. 28:

" 'It is doubtless true, as the Commission amply shows in its full report and supplemental report in these cases, that abuses exist in the conduct and practice of these lines and in dealings with other carriers which have resulted in unfair advantages to the owners of some tap lines and to discriminations against the owners of others. Because we reach the conclusion that the tap lines involved in these

appeals are common carriers, as well of proprietary as non-proprietary traffic, and as such entitled to participate in joint rates with other common carriers, that determination falls far short of deciding, indeed, does not at all decide, that the division of such joint rates may be made at the will of the carriers involved and without the power of the Commission to control. That body has the authority and it is its duty to reach all unlawful and discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers. It is not only within its power, but the law makes it the duty of the Commission to make orders which shall nullify such practices resulting in rebating or preferences, whatever form they take and in whatsoever guise they may appear. If the divisions of joint rates are such as to amount to rebates or discriminations in favor of the owners of the tap lines because of their disproportionate amount in view of the service rendered, it is within the province of the Commission to reduce the amount so that the tap line will receive just compensation only for what it actually does.'

"With respect to each of the tap lines that are parties to this proceeding, the original orders of the Commission, and the orders subsequently entered, so far as they relate to through routes, joint rates, and divisions, will be vacated and set aside; and upon the facts of record, we conclude and find that all the through routes and joint rates in effect prior to May 1, 1912, between the trunk lines and tap lines named on the record should be restored and re-established, and that the divisions out of the through rate on interstate shipments of lumber and forest products, from points on such of these tap lines as file tariffs and have otherwise complied with our accounting rules, etc., should not exceed the following maximum amounts: For switching a distance of 1 mile or less from the junction,

$2 per car; over 1 mile and up to 3 miles from the junction, $3 per car; on shipments from points over 3 miles and not more than 6 miles from the junction, 1½ cents per 100 pounds; over 6 miles and not more than 10 miles from the junction, 2 cents per 100 pounds; over 10 miles and not more than 20 miles from the junction, 2½ cents per 100 pounds; over 20 miles and not more than 30 miles from the junction, 3 cents per 100 pounds; over 30 miles and not more than 40 miles from the junction, 3½ cents per 100 pounds; over 40 miles from the junction, 4 cents per 100 pounds. These divisions are the net amounts that may be paid out of the trunk line rates from the junctions, and when the rates from points on the tap line are made by the addition of an arbitrary, such arbitrary shall accrue to the tap line.

"These divisions should be applied to all interstate shipments of lumber and forest products that moved from points on the tap lines between May 1, 1912, and the date the through rates and divisions are made effective in compliance with the order entered herein, and are a readjustment of the findings of our original report with respect to the divisions. In making these adjustments the tap lines should file with the Commission statements of cars moving during this period, in substantially the form used in our special reparation docket, certified to by the proper officer of the connecting trunk line over which the shipments moved. Upon these statements, when approved by the Commission, settlements may be made for the divisions that will have accrued under the order herein.

"In case the delivery of lumber and forest products to a trunk line involves a haul over two or more tap lines, the divisions herein fixed should be applied to the aggregate haul, and not to the separate service of each of the tap lines.

"The trunk lines will be expected to file with the Commission a copy of their division sheet with each of their respective tap-line connections, making effective the divisions fixed herein. The division sheet should show the distance in miles from each station or shipping point to the junction with the issuing carrier, in addition to the amount of the division. The tap lines should file with the Commission a copy of their distance tariff or a table of distances from all shipping points on their respective lines to the junctions with the connecting carriers.

"With respect to the milling-in-transit rate on logs as formerly practiced on the tap lines, we adhere to our original conclusion that the rate on lumber at the junction or mill point may not lawfully be extended back to the point on the tap line where the logs originate, and that any division out of the through lumber rate on account of the log haul can not be sanctioned.

"Since the original report and orders herein, two of the tap lines, parties to the original proceedings, have notified the Commission that they have ceased operations, and in the case of two others each has been purchased by and merged with a connecting line, and some additional orders and amended orders have been entered with respect to individual tap lines. Upon intervening petition five additional tap lines were made parties to this proceeding; five other tap lines were dismissed as parties, upon a showing that all the proprietary lumber had been cut out and the proprietary mill shut down, or that there had been a complete separation of the interests that controlled the tap line from the interests that controlled the lumber company. In the case of other tap lines we increased the allowances or divisions upon a showing that an increased service was performed, and in other cases, upon a showing of an extension of the track to another junction, we fixed

the allowances through the new gateway. In all these cases hearings or rehearings were held and the additional facts put of record. The specific action taken in each of these cases is recited in the order attached."

The Tap Line Case, 31 I. C. C. Rep. 490.

In the first Industrial Railways Case, the Commission condemned certain allowances and divisions of rates enjoyed by numerous industrial railroads in Official Classification Territory as constituting rebates, and declared many of the industrial railroads to be mere plant facilities.

Following the original report of the Commission in the Industrial Railways Case, 29 I. C. C. 212, the trunk line carriers in Official Classification Territory withdrew from joint rate arrangements theretofore had with the industrial roads involved in the Commission proceeding and also with substantially all other industrially owned lines in the territory which were not parties to that proceeding. These tariffs were published to become effective April 1, 1914. Protests were received from many of the industrial lines affected and from shippers located thereon. A large number of the industrial lines made no protest against the action of the trunk lines, apparently recognizing the justness of the conclusions reached in the original report of the Commission as applied to their respective situations. In some instances formal complaints were filed, alleging that through routes and joint rates covering the transportation of property between the points and places on the industrial line and points and places on or reached by way of the trunk line connections had been in effect for many years; that traffic over the industrial line had been built up in reliance thereon; that such points on the industrial lines had been included in rate groups or districts,

and that cancellation of the same would work unjust discrimination against shippers and places located upon the industrial lines and would constitute an unreasonable increase in the rates between points upon the industrial lines and points upon the lines of other railroads. These industrial lines asked, among other things, that the trunk lines be required to restore the through routes and joint rates theretofore in effect and to refrain from discrimination against the industrial lines and persons and places located along such lines. These formal complaints were entered under the Commission's Docket No. 4181, which was the number given to the original proceeding in the Industrial Railways Case, and that proceeding was consolidated with Investigation and Suspension Docket No. 414, in which latter proceeding the Commission suspended the tariffs purporting to cancel joint rates with and allowances to 22 of the industrial lines that were not involved in the original case. The effective dates of the tariffs under suspension were extended voluntarily by the carriers until July 15, 1919.

Second Industrial Railways Case, 34 I. C. C. Rep. 596, 600.
Tap Line Cases, 23 I. C. C. Rep. 549, 552.
Tap Line Cases, 31 I. C. C. Rep. 212.
Tap Line Cases, 31 234 U. S. 1.
Industrial Railways Case, 32 I. C. C. Rep. 129, 133.
Industrial Railways Case, 29 I. C. C. Rep. 212, 237.

Compare—

Express Rates, 35 I. C. C. Rep. 3, 4, 10.
A. T. & S. F. Ry. Co. vs. Kansas City Stock Yards Co., 33 I. C. C. Rep. 92, 98.
Mfrs. Ry. Co. vs. St. L. I. M. & S. Ry. Co., 32 I. C. C. Rep. 100, 106.
Joint Rates with Birmingham So. Ry. Co., 32 I. C. C. Rep. 110, 112, 118.

New York Dock Ry. vs. B. & O. R. R. Co., 32 I. C. C. Rep. 568, 569, 574.
Muncie & Western R. R. Co., 30 I. C. C. Rep. 434, 435, 436.
Tap Line Case, 23 I. C. C. Rep. 277.
Colonial Salt Co. vs. M. I. & I. L., 23 I. C. C. Rep. 358.
Kaul Lumber Co. vs. Caf. Ga. Ry. Co., 20 I. C. C. Rep. 450.
Crane Iron Works vs. Central R. R. Co., 17 I. C. C. Rep. 514, 518, 520.
Star Grain & Lumber Co. vs. N. Y. C. & H. R. R. R. Co., 14 I. C. C. Rep. 338, 345.
General Electric Co. vs. N. Y. C. & H. R. R. R. Co., 14 I. C. C. Rep. 237, 242, 243, 244.
Solvay Process Co. vs. D. L. & W. R. R. Co., 14 I. C. C. Rep. 246, 249.

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